TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted]

No. [redacted]

WELLS FARGO & COMPANY, PETITIONER,

vs.

OSCAR G. TAYLOR.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR CERTIORARI FILED [redacted]

CERTIORARI AND RETURN FILED [redacted]

(26,509)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 448.

WELLS FARGO & COMPANY, PETITIONER,

vs.

OSCAR G. TAYLOR.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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a UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit.

Pleas and Proceedings had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on Wednesday, November 21st, A. D. 1917, at New Orleans, Louisiana, before the Honorable Richard W. Walker and the Honorable Robert L. Batts, Circuit Judges, and the Honorable Beverly D. Evans, District Judge:

OSCAR G. TAYLOR, Appellant,

versus

WELLS FARGO & COMPANY, Appellee.

Be it remembered, that heretofore, to-wit, on the 20th day of June, A. D. 1917, a transcript of the record of the above
b styled cause, pursuant to an appeal from the District Court of the United States for the Northern District of Mississippi, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 3102 as follows:

c TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals, Fifth Circuit.

No. 3102.

OSCAR G. TAYLOR, Appellant,

versus

WELLS FARGO & COMPANY, Appellee.

Appeal from the District Court of the United States for the Northern District of Mississippi.

(Original Record Filed June 20, 1917.)

U. S. Circuit Court of Appeals. Filed July 19, 1917. Frank H. Mortimer, Clerk.

1 In the District Court of the United States for the Eastern Division of the Northern District of Mississippi.

Be it remembered, That at a term of the District Court of the United States for the Eastern Division of the Northern District of

Mississippi, begun and held at the City of Aberdeen, in said Division and District, on the First Monday of October, A. D. 1916, to which term of the Court the within styled and numbered cause was previously continued; and on the 5th day of said Term, being the 6th day of October, A. D. 1916, among other proceedings had at said Term, were the following, to-wit:

Present, The Honorable H. C. Niles, Judge of said Court, and the other officers of said Court as on the first day of the Term aforesaid.

No. 158, In Equity.

WELLS FARGO & COMPANY.

versus

OSCAR G. TAYLOR.

"This being a regular day of the October Term, 1916, of this Court, this cause came on for hearing; It is ordered and decreed that the cause be and is submitted to be heard during vacation on brief." (Minute Book 11, page 55.)

Thereupon said action was heard on briefs, and proceeded with to a final disposition as of the October Term, 1916, of said Court, and during the progress thereof pleadings and papers were filed and orders and decrees made and entered as of the days and dates hereinafter stated, to-wit:

2 *Assignment of Errors.*

In the United States District Court for the Eastern Division of the Northern District of Mississippi.

O. G. TAYLOR, Appellant,

vs.

WELLS FARGO & Co., Appellee.

Comes now the said Appellant, O. G. Taylor, and having asked for an allowance of an appeal from the decree herein against him sustaining the amended bill of the Appellee and allowing Appellee a perpetual injunction against Appellant restraining him from collecting a judgment he had obtained in the State Courts of Miss., and assigns as errors in said decree, and the proceedings of the court therein as follows:

1st. The Court erred on the reversal and remand of this cause from the United States Circuit Court of Appeals from the 5th Circuit in sustaining the motion of the Appellee and permitting it to amend the bill.

2nd. The Court erred on the reversal and remand of this cause from the United States Circuit Court of Appeals for the 5th Circuit

in overruling the motion of the appellant to dismiss the bill and dissolve the injunction.

3rd. The Court erred in overruling the objection of the appellant to the introduction by the appellee of the Messengers application and the Messengers agreement and release marked Exhibit "B," to Original Bill.

4th. The Court erred in overruling the Appellant's motion to dismiss the bill and dissolve the injunction, which motion was made at the close of Appellee's case and which motion was also made again at the close of Respondent's case both of which motions were overruled; because

3 A. The bill as amended was without equity.

B. Because the contract or Messenger's Agreement and release, Exhibit "B" upon which the appellee's case is based and under which it seeks relief is contrary to public policy because by it the St. L. & S. F. R. R. Co., a common carrier by railroad would relieve itself from liability of the gross negligence of its agents and employees on account of which gross negligence the appellant while lawfully on said train of said railroad company as an employee of said company was injured.

C. Because the contract or messengers agreement and release, Exhibit "B" is contrary to public policy for the reason that by means of the messengers agreement or release the appellee, a common carrier by railroad, is seeking to relieve itself from liability of the gross negligence of its agents and employees or partner or co-proprietor, to-wit, the St. L. & S. F. R. R. Co., in the course of its business, on account of which gross negligence the appellant, while lawfully on said train and while engaged in handling interstate commerce, was injured.

D. Because the evidence discloses the fact that Appellant was injured while handling interstate commerce as an employee of a common carrier by railroad on account of the negligence of the employees or agents or co-proprietor of said common carrier by railroad, and the messengers agreement or release, Exhibit "B," the basis of appellee's suit, is void and unenforc-able as violative of the provisions of an Act of Congress of April 22nd, 1908, Chapter 149, 35 Statutes at Large, page "65" Sections 1 and 5 thereof and amendments thereto.

E. Because it is contrary to public policy and the comity of Courts for the U. S. District Court to grant the prayer of the prayer of the bill for injunction restraining the appellant from issuing execution to collect a judgment obtained without fraud in the State Courts of Miss., against the St. L. & S. F. R. R. Co., a court of

4 concurrent jurisdiction with the U. S. District Court; as it would be an interference with the jurisdiction of the said State Courts first had and obtained in the above styled cause.

F. Because by taking a jurisdiction and granting the appellee the injunctive relief restraining Appellant from issuing an execution to collect a judgment obtained by him in the case in the State Courts of Miss., against the St. L. & S. F. R. R. Co., the District Courts of the United States would be acting contrary to and in violation of

Section 720 of the Revised Statutes of the United States of America and in violation of Sec. 265. Chapter 11 of Judiciary Act of March 3, 1911.

G. Because it appears from the record and the evidence in the case that the appellee voluntarily sought the jurisdiction of the State Courts of Miss., in the case of O. G. Taylor, the appellant, vs. the St. L. & S. F. R. R. Co., requesting that it be made a party defendant with the said Railroad Co., and that upon being denied this by said State Court, the Appellee did not exhaust its remedy given it in the State Courts of Miss., by appeal to the Supreme Court of Miss., on this Adverse ruling but abandoned the same and filed the present suit in the U. S. District Court.

H. Because it appears from the evidence in the case and the record that the messengers agreement or release, Exhibit "B," and the contract between appellee and the St. L. & S. F. R. R. Co., Exhibit "A" to the original bill in this cause, were offered in evidence by said railroad company in the case of O. G. Taylor, appellant, vs. the St. L. & S. F. R. R. Co., in the State Courts of Miss., and the messengers agreement or lease, Exhibit "B," was held void and unenforce-able by the Circuit Court of Monroe County, Miss., and on appeal by the Supreme Court of Miss., and no appeal was prosecuted to the Supreme Court of the U. S. by the said Railroad company from said judgment and rulings and therefore the said judgment and ruling by the State Courts of Miss., and the construction placed by the State Courts on the messengers agreement or release Exhibit "B," stand unreversed and the U. S. District Court was bound by the construction and ruling and judgment of the State Courts and there could be no legal fraud committed by appellant in obtaining this judgment.

5th. The Court erred in rendering the final decree in this cause granting a perpetual injunction against the appellant and restraining him from issuing an execution to collect the judgment obtained by appellant against the S. L. & S. F. R. R. Co., in the State Courts of Miss., and in decreeing specific performance of the messengers agreement or release.

6th. The Court erred in not decreeing the dissolution of the injunction heretofore granted appellee and erred in not dismissing the bill in this cause and taxing appellee with the costs.

Wherefore and by reason of said errors as appears from the record in this cause, appellant says there is error in the record for which the cause should be reversed and said Court directed to dismiss the bill and dissolve the injunction and the appellee and its bondsmen be taxed with all the costs of this proceeding.

PAINE & PAINE.
Counsel for Appellant.

Indorsed: Assignment of Errors. Filed April 26th, 1917.

6 In the United States District Court for the Eastern Division of the Northern District of the State of Mississippi.

In Equity. No. 158.

WELLS FARGO & CO.

vs.

OSCAR G. TAYLOR.

This day this cause came on to be heard, it being a regular day of the October Court, 1916, and it appearing to the Court that the defendant, Oscar G. Taylor, has prayed for an appeal in open court and filed his assignment of errors and has also tendered into court his appeal bond for costs in the amount of $500.00; and it further appearing to the Court, that this is the same term of the Court in which the above styled cause came on for trial and that the cause was taken under advisement for decision in vacation as of this term of court, and that it is the same term of court in which the decree was entered for Complainant and against the Defendant;

It is therefore the judgment of the Court and so ordered and decreed that the petition of appeal for the defendant to the United States Circuit Court of Appeals for the 5th Circuit be allowed and the bond as tendered into Court be approved.

This the 27th day of April, 1917.

H. C. NILES,
District Judge.

Indorsed: Decree Allowing Appeal. Filed April 28, 1917.

In the United States District Court for the Eastern Division of the Northern District of the State of Mississippi.

In Equity. No. 158.

WELLS FARGO & CO.

vs.

OSCAR G. TAYLOR.

The above named defendant, conceiving himself aggrieved by the decree made and entered on the 26th day of April, 1917, in
7 the above styled cause, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Fifth Circuit, for the reason specified in the assignment of errors, which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, procedure and papers upon which

said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fifth Circuit.

PAINE & PAINE,
Attorneys for Defendant.

The foregoing claim of appeal is allowed, this the 27th day of April, 1917.

H. C. NILES,
District Judge.

Indorsed: Petition for Appeal. Filed April 28th, 1917.

In the United States District Court for the Eastern Division of the Northern District of the State of Mississippi.

In Equity. No. 158.

WELLS FARGO & CO.

vs.

O. G. TAYLOR.

Know all men by these presents, that we, O. G. Taylor, as principal, and George C. Paine and W. E. Ware, sureties are held and firmly bound unto Wells Fargo & Co., in the full and just sum of $500.00, to be paid Wells Fargo & Co., their attorneys, executors or administrators or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents. Sealed with our seals and dated, this the 29th day of March, 1917.

Whereas, lately at a District Court for the Eastern Division of the Northern District of Mississippi, in a suit pending in said
8 Court between Wells Fargo & Co., Complainant, and O. G. Taylor, defendant, a decree was rendered against the said defendant, O. G. Taylor, and the said Taylor having obtained an appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the Wells Fargo & Co., citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Fifth Circuit to be holden at the City of New Orleans, La., on the 3rd Monday of November, 1917, next.

Now the condition of this bond is such that if the said O. G. Taylor shall prosecute his appeal to effect and answer all damages and costs, if he fail to make his plea good, then the above obligation to be void, otherwise to remain in full force and effect and virtue.

Signed and delivered in the presence of Geo. H. Edwards and Henry Dugan, this the 29th day of March, 1917.

(Signed) O. G. TAYLOR,
By PAINE & PAINE, *Atty's.*
GEORGE C. PAINE.
W. E. WARE.

Approved by
H. C. NILES,
U. S. District Judge.

Indorsed: Appeal Bond. Filed April 28, 1917.

9 *Original Bill.*

In the Circuit Court of the United States in and for the Eastern Division of the Northern District of Mississippi, October Term, 1910.

In Equity.

WELLS FARGO & CO., Complainant,

vs.

OSGAR G. TAYLOR, Defendant.

To the Honorable, the Judges of the Circuit Court of the United States for the Eastern Division of the Northern District of Mississippi:

Wells Fargo & Company, a corporation, chartered under and by virtue of the laws of the State of Colorado and a citizen of the said State of Colorado, having its principal place of business in said State, and being a foreign corporation in the State of Mississippi, brings this bill against Oscar G. Taylor, a resident citizen of the City of Aberdeen, County of Monroe, State of Mississippi, in the Eastern Division of the Northern District of Mississippi.

And your Orator says, that among other things, it is authorized by its charter to do an Express business within the United States of America, and in furtherance of this business to make contracts with the Railroad Companies and other common carriers for the carrying of its express, and furthermore to make contracts with parties to accompany said shipments of express in the cars of the said Railroad Companies or in the vehicles of other common carriers to care for and protect the said express packages as express messengers, or guards.

Your Orator further states and shows unto the Court that on the 10th day of February, 1906, it made a contract with the St. Louis and San Francisco Railroad Company, a corporation chartered and existing under and by virtue of the laws of the State of Missouri, for the handling of the express of your Orator on the trains of the

Saint Louis and San Francisco Railroad Company. That under and by virtue of this contract, your orator handled the express on the passenger trains of the above named railroad company be-
10 tween Aberdeen, Monroe County, Mississippi, and Amory, Monroe County, Mississippi; your orator having an express messenger or guard to accompany said express between the two above named points. That, under and by virtue of this contract with the said Railroad Company, your orator assumed all risks and damages to its agents and employees while engaged in its business on any of the railways or on the property of the above named Railroad Company, and thereby agreed to indemnify and hold harmless the Saint Louis and San Francisco Railroad Company on account of all claims for damages suffered by the agents and employees of the Express Company while engaged in its business on any of the Railways, or property of the above named Railway Company. That this contract with the Saint Louis & San Francisco Railroad Company, was in force and effect during the month of December, 1909. (A copy of which contract is hereto attached, marked Exhibit "A," and asked to be taken and considered as a part of this bill).

Your orator would further state and show unto the Court that on April 20th, 1909, the Defendant, Oscar G. Taylor, and your orator entered into a written agreement duly signed and executed by the said Oscar G. Taylor, under and by virtue of which agreement, Oscar G. Taylor became an employee of your orator whose duty it was as said employee to accompany said express matters of your orator on the passenger trains of the Saint Louis & San Francisco Railroad Company between Aberdeen and Amory, towns in Monroe County, Mississippi. * * * (Here Amendment). These said passenger trains being known as the Aberdeen Branch trains. That this agreement signed and executed by the said Oscar G. Taylor provided, among other things, that since the common carriers, or Railroads would not allow the said employees of your orator to ride on its trains, except upon the agreement that your orator would hold the said Railroad Company or common carrier harmless from any and all liability for injuries which such employees of your orator might receive while accompanying said goods, or traveling on their lines as such employees, and whereas the defendant, Oscar
11 G. Taylor, with full knowledge of all the foregoing facts was desirous of entering into the employment of your orator as one of such messengers or guards, and whereas, your orator declined to employ the said Oscar G. Taylor, except upon the condition that he would agree that neither your orator, nor the said Railroad Company should under any circumstances, or in any case whatever, be liable for any injuries occurring to said Oscar G. Taylor while so traveling, whether such injuries should arise from any fault, carelessness, or negligence, gross, or otherwise on the part of the said Railroad Company, its Agents or Servants; it being the intention of this contract that Oscar G. Taylor should assume all and every risk, incident to said employment from whatever cause arising. The said agreement further provides that it shall extend to and inure to the benefit of the said Railroad Company. (A copy of this agree-

ment is hereto attached marked Exhibit "B," and is asked to be taken as a part of this bill).

That on the 8th day of December, 1909, while Oscar G. Taylor was acting as an employee of your orator under and by virtue of his contract made with your orator, above set out, and was riding on a train of cars of the said Saint Louis & San Francisco Railroad Company in charge of the express of your orator, this train of cars became wrecked ,and the express car, in which the defendant was traveling was thrown to the ground and Oscar G. Taylor sustained personal injuries to his body.

Your orator further states and shows unto the Court that on or about the 10th day of February, 1910, the defendant, Oscar G. Taylor, brought a suit against the Saint Louis and San Francisco Railroad Company in the Circuit Court of the County of Monroe, State of Mississippi, which suit is still pending, for the sum of Twenty Thousand ($20,000.00) Dollars on account of the personal injuries sustained by him in the wreck of the train of the Saint Louis & San Francisco Railroad Company as above set out. * * * (Here Amendment).

Your orator would further state and show unto the Court that it was not made a party defendant to this suit in the Circuit
12 Court of Monroe County, Mississippi, though it is the real party in interest in said suit. That on the 14th day of March, 1910, your orator filed in the Circuit Court of Monroe County, Mississippi, a petition setting out its contract with Oscar G. Taylor, and its contract with the Saint Louis & San Francisco Railroad Company and prayed the said Circuit Court to make it a party defendant to the above suit of Oscar G. Taylor against the Saint Louis & San Francisco Railroad Company, because it is the real party in interest and desired to be made a party to the suit in order that it might remove it to the Circuit Court of the United States for this District of Mississippi. That the said Saint Louis & San Francisco Railroad Company filed a motion in the said Circuit Court of Monroe County, asking that the plaintiff in said suit be required to make your orator a party defendant to the suit, but the said petition of your orator was denied, and the said motion of the Sait. Louis & San Francisco Railroad Company overruled, and your orator was therefore deprived of the right to remove the said suit into the Circuit Court of the United States for the Eastern Division of the Northern District of Mississippi.

Your orator would further state and show unto the Court that if the said Oscar G. Taylor should recover a judgment against the Saint Louis & San Francisco Railroad Company in his suit now pending against it in the Circuit Court of Monroe County, that under and by virtue of your orator's contract above set out with the Saint Louis & San Francisco Railroad Company, your orator would have to pay the amount of the said judgment recovered by Taylor and further indemnify the Railroad Company for any expense incurred by it on account of this law suit.

Your orator would further state and show unto the Court that the defendant, Oscar G. Taylor, is a man of no means, and so far as your

orator can ascertain has no property upon which an execution could be issued in case your orator should be compelled to sue the said Oscar G. Taylor on its contract with him above set out, and
13 should recover a judgment against the said Taylor for the amount your orator would be compelled to pay to the Saint Louis & San Francisco Railroad Company, on account of the said suit in Monroe County, Mississippi of the said Oscar G. Taylor against the said Railroad Company. In other words, while your orator would have to indemnify the Railroad Company, by virtue of its contract with it, your orator could not compel Taylor to indemnify it because Taylor has not sufficient property upon which execution might be levied.

Your orator would further state and show unto the Court that irreparable wrong and injury and financial loss would be sustained by it if the said defendant Oscar G. Taylor is permitted to proceed with his suit in the Circuit Court of Monroe County, Mississippi, against the Saint Louis & San Francisco Railroad Company.

Your orator would further state and show unto the Court that he has no adequate relief in a court of law.

Premises considered, your orator would pray that this Court issue a temporary injunction or restraining order directed to the said Oscar G. Taylor of the City of Aberdeen, Monroe County, Mississippi, restraining him from proceeding with his suit in the Circuit Court of Monroe County, Mississippi, against the Saint Louis & San Francisco Railroad Company until this bill has been heard upon its merits; Second, that a writ of subpœna issue from this Honorable Court, directed to the said defendant, commanding him to appear at a certain day and under a certain penalty, therein to be expressed, before this Honorable Court to answer this Bill—(Answer under oath is hereby expressly waived)—and to do and receive what to your Honors may be meet and proper in the premises; and that on final hearing your Honors will enter a decree that the defendant, Oscar G. Taylor, do specifically perform and carry out the said agreement entered into between him and your orator, and that he be perpetually enjoined from proceeding with his law suit against the Saint Louis & San Francisco Railroad Company; that he be required to execute and deliver to the Saint Louis & San Francisco Railroad Company a good and sufficient release of all claims
14 and causes of action, arising out of the injuries sustained by him above described in this Bill; and for such other, further, different, and general relief as your Honors may deem meet and proper in the premises, and as in duty bound, it will ever pray.

E. O. SYKES, JR., AND
J. A. SYKES,
Solicitors for Complainant.

STATE OF MISSOURI,
City of Saint Louis:

I, C. F. Belcher, of lawful age and being first duly sworn, upon my oath, depose and say that I am an Agent and Assistant Superin-

tendent of the above named complainant, Wells Fargo & Company, and as such, make, and am authorized to make this affidavit; that I have read the above and foregoing bill and am acquainted with the facts therein stated and that they are true as I verily believe.

C. F. BELCHER.

Sworn to and subscribed before me this the 29th day of April, A. D. 1910.

[NOTARIAL SEAL.] JAMES J. DILLON.

My commission expires on the 13th day of Feb'y, A. D. 1914.

EXHIBIT "A."

This agreement made and entered into this 10th day of February, 1906, by and between the St. Louis & San Francisco Railroad Company, a corporation duly authorized and existing under and by virtue of the laws of the State of Missouri, for itself and for all lines now or hereafter owned, operated, leased, or controlled by it, or with which it has trackage arrangements, for convenience hereinafter called the "Railroad Company" party of the first part, and Wells Fargo & Company, a corporation duly organized and existing under and by virtue of the laws of the State of Colorado, for convenience hereinafter called the "Express Company," a party of the second part;

Witnesseth:

First. That in consideration of the payments, covenants and agreements hereinafter set forth, to be by the Express Company duly made, kept and performed, and subject to the provisions and conditions herein contained, the Railroad Company hereby agrees to transport or cause to be transported by cars attached to regular passenger trains, over all lines aforesaid, to and from all stations at which said trains make regular stops, the messengers, safes, packing trunks, and express matter of said Express Company on all of said passenger trains each way daily, and so often as said trains may run; provided, however, that the persons hereby agreed to be transported shall be only such as accompany the express matter and valuables of the Express Company, and such other persons as it may become necessary to send over the aforesaid railways, upon the business of said Express Company, and that for such persons passes shall be granted by the Railroad Company on the written application of a duly authorized officer of the Express Company.

Second. That for the convenience of the aforesaid messengers safes, packing trunks and express matter, the Railroad Company agrees to provide cars or car space, and to light and warm the same when necessary and furnish the same with other customary conveniences, on all said passenger trains running upon the herein mentioned lines.

Third. That the Railroad Company further agrees that it will,

so far as it can conveniently do so, permit the Express Company to use a portion of its station houses on the lines herein described, or hereafter acquired, as provided in the preamble and article twelve without charge therefor, for the reception, safe keeping and delivery of express matter carried under this agreement; and it further
16 agrees that none of its employees, for themselves, or for said Railroad Company, be allowed to transport on said passenger trains, money, valuable packages, goods, or merchandise of any kind whatsoever, except passenger's baggage, or goods or material for the use of the Railroad Company.

Fourth. The express business to be carried on under this contract is understood to mean all such business as is commonly carried by express companies at the present time, or as may be carried by them during the continuance of this contract, and the Railroad Company agrees that it will not carry or transact any express business on its own account, nor permit any of its agents or employees to carry or transact such business; nor will it grant to any person or persons, corporation or association, any express transportation or facilities whatsoever upon all or any part of the said Railroad Company's lines, either for through or local traffic, during the continuance of this contract, and any such express business offered to the Railroad Company shall be turned over to the Express Company to be carried by and for the benefit of the Express Company.

Fifth. That the Railroad Company further agrees to transport, free of charge, over the lines covered by this contract, the wagons, horses, provender, safes and other materials to be used by said Express Company in the transaction of its business at the various points on the lines embraced in this agreement; and it also agrees that the express company shall have the right to employ the agents and servants of the Railroad Company as its own agents, when such employment will not, in the opinion of the Railroad Company, be to the interruption or detriment of its business; provided, however, that in no case shall the Railroad Company be in anywise responsible for any loss, cost or damage caused by the negligence or malfeasance of such servant or agent when so acting as agent for the Express Company.

17 Sixth. The Railroad Company agrees that it will also transport, free of charge, and with due dispatch, over any telegraph lines now or hereafter owned, operated, or controlled by it, or by any of the Railroad Companies whose lines are covered by this contract, the messages of the Express Company, or its officers or agents, relating to its said Express business on said lines, and will also give its good will and influence in securing to the Express Company any other telegraph facilities which may by the Express Company be hereafter desired. Provided, that the Express Company hereby agrees to assume and does assume, all risks of damage by reason of inaccuracy or delay in transmission, delay in delivering or failure to deliver any message, transmitted under this contract; and provided, further, that this article shall not be held or construed to require the Railroad Company to afford the Express Company any telegraphic facilities which it cannot perform under its existing con-

tract and legal obligations, or under any contracts which it may hereafter make.

Seventh. In consideration of the covenants and agreements of the Railroad Company hereinabove set forth to be by it duly kept and performed, the Express Company agrees that it will pay to the Railroad Company amounts equal to fifty-five per cent (55%) of the gross earning derived from the express business transacted on the lines herein mentioned, and in computing such earnings on all matter destined to or shipped from points beyond any termini of the lines of the Railroad Company herein described, the same shall be accounted for on a pro rata per mile carried of the entire through rate charged thereon; and the Express Company having this day entered into agreements similar in form in many respects to this agreement, with each of the following named railroad companies, to-wit: Chicago and Eastern Illinois Railroad Company, the Evansville and Terre Haute Railroad Company, the St. Louis, San Francisco and Texas Railway Company, the Fort Worth and Rio Grande Railway Company, and the Paris and Great Northern Railroad Company, covering the express business on the respective lines of
18 the above named companies, the Express Company hereby covenants that said fifty-five per cent. (55%) of such gross earnings, derived from the express business transacted on the lines covered by this contract, when taken together with the several sums of money paid and agreed to be paid to said Chicago and Eastern Illinois Railroad Company, Evansville and Terre Haute Railroad Company, St. Louis, San Francisco and Texas Railroad Company, Ft. Worth and Rio Grande Railway Company, and Paris and Great Northern Railroad Company under and by virtue of said several contracts herein named, as consideration for the services to be rendered and the facilities to be furnished by said respective companies under said contracts, shall in no case be less than One Hundred and Seventy ($170.00) Dollars per mile per annum for the aggregate mileage of all said lines, including the mileage covered by this agreement, provided, that the mileage in the Northern Division (Kansas City District) between Kansas City and Fort Scott, and the mileage in the Ash Grove District between Fort Scott and Springfield, shall be excluded from consideration in computing the minimum guaranteed by the above covenant; and, provided, further, that the above named minimum shall not apply to or include the mileage designated in the attached schedule, as mileage to which the eighty-five ($85) dollar per mile minimum applies, or to any other mileage covered by the trackage, or other mileage arrangements by which the Express Company, though permitted to do through business, is excluded from transact*ed* local business over the same, or to any other mileage over which express facilities are furnished exclusively on mixed trains, but all such mileage as is included in this proviso, or so designated in said schedule shall be computed at a minimum of one half the regular mileage minimum, or eighty-five ($85) dollars per mile per annum.

Eighth. The Express Company hereby stipulates and agrees that it will well and truly pay or cause to be paid to the Railroad Com-

pany for the services by it rendered, and facilities furnished in pursuance of this agreement, as follows: One twelfth of the
19 mileage minimum so guaranteed shall be paid not later than the fifteenth day of each month for the preceding month to Treasurer of said Railroad Company; provided, however, (*a*) That so soon as a statement of the business transacted during the preceeding month can be made after the close of the month a copy of such statement shall be transmitted to the Railroad Company and it shall have the right to examine in detail, through its designated officer, the accounts of the Express Company relating to its business under this agreement, for the purpose of determining the correctness of the statement rendered, and if it shall appear by the monthly statements so rendered that fifty five (55%) per cent. of the gross earnings derived from the express business transacted on the lines operated as set forth in section seventh hereof, is in excess of the sum hereby guaranteed as a minimum payment per mile, in any one year, then further payment of such excess shall be made to the Treasurer of the Railroad Company, within ninety days after the close of such year.

(*b*) At the end of each year and immediately after the amount of gross earnings for such year shall have been ascertained, as provided in paragraph (*a*) of this Article, an accounting shall be had of the amounts paid and agreed to be paid to the Chicago and Eastern Illinois Railroad Company, the Evansville and Terre Haute Railroad Company, the St. Louis, San Francisco and Texas Railway Company, the Ft. Scott and Rio Grande Railway Company, and the Paris and Great Northern Railway Company, as well as of the amounts paid and agreed to be paid to the Railroad Company as fifty five (55%) per cent of the gross earnings derived from the express business transacted on the lines operated under this agreement, and if the amount so paid and agreed to be paid to the Railroad Company when taken together with all the sums paid and agreed to be paid to said Chicago and Eastern Illinois Railroad Company, Evansville and Terre Haute Railroad Company, St. Louis, San Francisco and Texas Railway Company, Fort Worth and Rio Grande
20 Railway Company, and Paris and Great Northern Railroad Company, under the contracts with said last named companies hereinbefore referred to, shall amount to a sum less than the amount hereby guaranteed as a minimum payment per mile in any one year, then further payment of such deficit shall be made to the Treasurer of the Railroad Company within four months after the close of such year.

Ninth. The Express Company hereby further agrees that it will not without the consent of the Railroad Company charge less than one and one half current railroad tariff freight rates on any matter between intermediate points exclusive to the lines covered by this contract. And the Express Company hereby further agrees that it will not charge, without the consent of the Railroad Company, less than one and one-half current railroad tariff freight rates on any matter from or to any points whatever upon said lines except where

it may be necessary to do so to meet the competition of other express companies.

Tenth. That the Express Company further agrees that it will and it does hereby assume all risks, losses and damage to its own property, express matter and valuable packages, carried under the provisions of this contract; and also that it will and it does hereby assume all risk and damage to its agents and employes while engaged in its business on any of the railways or property of the Railroad Company, and hereby agrees to indemnify and hold harmless the St. Louis & San Francisco Railroad Company on account for all claims for damages suffered by the agents and employes of the Express Company while engaged in its business on any of the railways or property of the Railroad Company, and further agrees to indemnify and hold harmless the Railroad Company for any loss or damage suffered by it or for which it may be held liable on account of any wrongful or negligent acts of the agents of the Express Company while engaged in its business on any of the railways or property of the Railroad Company.

21 Eleventh. That the express company further agrees to carry, without charge, as a part of the consideration of this contract, over any and all of the lines of the railway above mentioned, all money and other valuable packages belonging to the Railroad Company, or pertaining to its business, and to deliver the same as addresed at all proper places of delivery on said lines or at the termini thereof; provided, however, that the Railroad Company shall assume all risks of loss or injury of or to such money and other valuable packages, unless the same shall be caused by fault or dishonesty of the employees of the Express Company; and the Express Company will also carry packages not exceeding twenty (20) pounds in weight each, over other lines operated by it, providing such lines do not object; it being understood that its liability in such case is subject to the same limitations as set forth in this contract.

Twelfth. For all purposes of this agreement, the St. Louis & San Francisco Railroad Company is to be regarded as embracing not only the main line of the road of the company, but also all branches and leased lines now in its possession, and all lines of road that may hereafter be acquired by lease, or by construction, or by purchase, and all lines of road that the Railroad Company does now, or may hereofter control, by any form or agreement or arrangement, in such manner as to enable the Railroad Company to empower the Express Company to transact an express business on and over the same, and in case, at any time during the perios [period] of this contract, the Railroad Company shall abandon and shall cease to furnish to the Express Company any express facilities over any portion of the lines of railroad hereby covered, then and in that case such portion of such lines of the Railroad Company shall be excluded from this contract and shall not thereafter be considered in determining the minimum amount of compensation to be received by the Railroad Company.

A statement of the present mileage operated under the contract

with the Chicago and Eastern Illinois Railroad Company,
22 with the Evansville and Terre Haute Railroad Company, with the St. Louis, San Francisco and Texas Railway Company, with the Fort Worth and Rio Grande Railway Company, and with the Paris and Great Northern Railroad Company, respectively, as well as the present mileage operated under this contract, is hereto attached and initialed for identification.

For the purpose of determining the proper or correct mileage under this contract from time to time, the Comptroller or General Auditor of the Railroad Company will duly advise either the President or the General Auditor of the Express Company in detail of any additions thereto or deductions therefrom; Provided, that when the Comptroller or General Auditor of the Railroad Company shall so advise the President or General Auditor of the Express Company of any additions to the present mileage of either the Railroad Company or any of the other companies herein named, the question of whether the minimum guaranty of one hundred and seventy ($170) dollars a mile shall apply to additional mileage, or whether the minimum guaranty of eighty-five ($85) dollars a mile shall apply thereto, or whether such additional mileage shall be entirely excluded from consideration in computing the minimum guaranty under this agreement, shall be taken up between the two companies and adjusted with fairness and candor, and a memorandum of such supplemental mileage with the adjustment as to the application of the minimum, shall be attached to this contract and made a part hereof.

Thirteenth. This agreement shall take effect on the first day of July, 1906, and shall continue and remain in force until July 1st, 1909, and thereafter until either of the parties hereto shall give to the other six months notice in writing of its desire to terminate the same, and during the continuance thereof shall be binding upon the parties hereto, their and each of their successors and assigns.

In witness whereof, the parties hereto have caused this agreement to be executed in duplicate by their respective officers thereto
23 duly authorized, the day and year first above written.

Approved as to form.
(Sgd.) L. F. PARKER,
General Solictor.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY,
(Sgd.) By A. J. DAVIDSON,
[SEAL.] *President.*

Attest:
(Sgd.) F. H. HAMILTON,
Secretary.

WELLS FARGO & COMPANY,,
(Sgd.) By DUDLEY EVANS,
[SEAL.] *President.*

Attest:
(Sgd.) H. B. PARSONS,
Secretary.

EXHIBIT "B."

Wells Fargo & Company Express.

Messenger's Agreement.

STATE OF MISSISSIPPI.

Aberdeen Office, April 20th, 1909.

This agreement, made the day, year and place above set forth, between Wells Fargo & Company, a corporation, party of the first part, and Oscar Greenberry Taylor, of Aberdeen, State of Mississippi, party of the second part, witnesseth:

Whereas, the said party of the first part is an express company, neither owning, controlling, managing, or in any way directing any railroad, steamboat or stage line, or other method of transportation, or any cars, boats, stages or means of transportation, but relying wholly upon railroads, steamboats, stages and other methods
24 of transportation, entirely owned, controlled, managed, and directed by other corporations, or by individuals, for the forwarding and transportation of goods and other freight intrusted to it to be forwarded and transported; and whereas, goods and other freight forwarded and transported by it over railroad lines are required to be and are carried in express or baggage cars; and whereas, in order to the proper and convenient dispatch of its business, it is usually necessary for the party of the first part to have guards to guard money shipments, and to have messengers accompany goods and other freight forwarded and transported by it, and ride in the cars in which said goods or freight may be; and whereas, the proprietors or owners of said railroad, and other lines over which it does business, will not allow the employees of the party of the first part to accompany such goods or other freight, and ride in the cars, boats, stages or other vehicles in which the same may be, except upon the agreement that said party of the first part will hold them harmless from any and all liability for injury which such employees of the party of the first part may receive while accompanying said goods or other freight, or traveling on their lines, as such employees; and whereas, the party of the second part, with full knowledge of all the foregoing facts, is desirous of entering the employment of the party of the first part, as one of such messengers or guards, as aforesaid; and whereas, the party of the first part declines to employ the party of the second part except upon the condition that this agreement shall be duly executed and delivered by the party of the second part.

Now, in consideration that the party of the first part receives the party of the second part into such employment, and of the salary to be paid therefor, and of the premises, it is agreed: that neither the party of the first part, nor any railroad or steamboat company, or other carrier, on whose lines said party of the second part may

travel, as such messenger or guard, shall, under any circumstances, or in any case whatever, be liable for any injury occurring to said party of the second part, while so traveling, whether such injury arises from any fault, carelessness or negligence, gross or otherwise, on the part of said railroad or steamboat company, or other carrier, its or their agents or servants; it being the intent of this contract that said party of the second part shall and will assume all and every risk incident to said employment, from whatever cause arising.

In consideration of the premises, and the sum of one dollar to him in hand paid, the receipt whereof is hereby acknowledged, the party of the second part further agrees that this agreement shall extend to and inure to the benefit of any railroad or steamboat company, or other carrier, upon whose line the party of the second part may receive injury in the course of and during said employment. In the event of any future employment of the party of the second part, by the party of the first part, this agreement shall be binding on the parties hereto, and shall apply to such future employment.

Witness the hand and seal of the party of the second part at the date aforesaid.

(Signed) O. G. TAYLOR. [SEAL.]
OSCAR GREENBERRY TAYLOR. [SEAL.]

Witness:
L. B. PETTIGREW.

Indorsed:—Bill for Specific Performance, etc. Filed May 2nd, 1910.

Supplemental Bill.

In the Circuit Court of the United States for the Eastern Division of the Northern District of Mississippi, October Term, 1910.

No. 158.

WELLS FARGO & COMPANY

vs.

OSCAR G. TAYLOR.

To the Honorable the Judges of the Circuit Court of the United States for the Eastern Division of the Northern District of Mississippi:

Wells Fargo & Company, a corporation, chartered under and by virtue of the laws of the State of Colorado and a resident citizen of the said state of Colorado, having its principal place of business in said State and being a foreign corporation of the State of Mississippi, presents the following supplemental bill against Oscar G. Taylor, who is a citizen and a resident of the City of Aberdeen, County of

Monroe, State of Mississippi and of the Eastern Division of the Northern District of Mississippi; and thereupon your orator complains and says:

That heretofore, and on or about the 2nd day of May, A. D. 1910, your orator duly filed his original bill of complaint in this Honorable Court against the Defendant, in which your orator prays for certain relief, the particulars of which are set forth in said original bill, filed in the office of the Clerk of this Court on the said 2nd day of May, A. D. 1910—reference to which is hereby made the same as if the same were set forth herein in full—. And your orator further shows unto your Honors that said above named defendant was duly served with process or subpœna in said suit, and has duly appeared and filed a demurrer in due course.

27 Your orator would respectfully represent and show unto the Court that since the filing of the original bill in this cause by your orator, and the filing of the demurrer by the defendant and the over-ruling of the application of your orator for a temporary restraining order, or injunction against the said defendant, restraining him from proceeding with this suit in the State Circuit Court of Monroe County, Mississippi against the Saint Louis and San Francisco Railroad Company, fully set forth in the original bill, the State Circuit Court has held its June Term in said County, when the following proceedings were had in the said State Court in the above mentioned suit of Oscar G. Taylor against the said Saint Louis and San Francisco Railroad Company, viz:

Before the said cause was set for trial upon its merits, the defendant, the Saint Louis and San Francisco Railroad Company, filed a motion for a continuance, setting out the fact of the filing of the bill in this Honorable Court by Wells Fargo & Company against the said Taylor, and also setting out the fact that in the Equity suit, pending in this Honorable Court, the questions involved in the State Court would be finally and completely adjudicated along with the other questions involved in the said cause in this Honorable Court, and alleging further that it was unnecessary and would be a useless expenditure of time and trouble for the State Court to try the cause and that it would result in harm to Wells Fargo & Company, the real party in interest, and to the Defendant Railroad Company also for the State Court to proceed to the trial of the cause. And further setting forth the gist of the allegations alleged in the original bill filed in this Honorable Court.

That upon a hearing of the said motion for a continuance, the Circuit Court overruled the same and set the case peremptorily for trial. That said cause was tried in the said State Court on or about July 12th, A. D. 1910, and that in the course of the said trial the defendant offered in introduction as evidence the Messenger's Agreement purported to be signed by said Oscar G. Taylor,—a copy

28 of which said agreement is attached to the original bill as an exhibit,—and that before the offer or introduction of said Messenger's Agreement above referred to the said defendant Railroad Company, proved by a witness, one L. B. Pettigrew, that the said Oscar G. Taylor had duly signed the said agreement. After

the introduction of said testimony and upon motion of the attorneys for the Plaintiff, the said Circuit Court excluded the testimony of the said L. B. Pettigrew and declined to allow the said defendant to introduce in testimony the said Messenger's Agreement. The said Circuit Court held that the said Messenger's Agreement or contract was not a legal defense for the said defendant Railroad Company because it is in the nature of a contract against negligence. Whereupon the case was submitted to the jury upon a peremptory charge of the Circuit Court to return a verdict for the Plaintiff and assess his damages as shown by the testimony.

The jury then returned a verdict for the plaintiff for the amount of Four Thousand Dollars ($4,000.00), whereupon the Circuit Court entered judgment for the plaintiff for this amount.

The defendant filed in Court a motion for a new trial, which was over ruled by the Court.

The defendant Railroad Company has since filed its application for an appeal together with a supersedeas bond for the amount of Eight Thousand Dollars ($8,000.00) and the cause is now appealed to the Supreme Court, but the transcript of the same has not as yet, to the knowledge of your orator been filed with the Supreme Court Clerk.

Your orator would further state and show unto your honors that the costs of the Circuit Court trial, including the witness fees, etc., amounted to about One Hundred and Twenty-Four Dollars and Twenty-five Cents, as shown by the Cost Bill of the State Circuit Clerk.

Your orator would further state and show unto the Court that the defendant Railroad Company made its appeal bond for Eight Thousand Dollars with the guaranty company, which will cost an amount of money not known to your orator.

29 That your orator, as the real party in interest, in said suit, pending in the State Court, will have to pay all judgments and all costs rendered against the defendant, the Saint Louis and San Francisco Railroad Company in accordance with its said contract with the Railroad Company made an exhibit to the Original Bill, and that your orator cannot approximate what the total amount of said judgment and costs will be in case the said Supreme Court affirms the judgment of the State Circuit Court.

* * * Your orator would further state and show unto the Court that on the 9th day of July, A. D., 1912, the Supreme Court of the State of Mississippi affirmed the judgment for Four Thousand Dollars ($4,000.00) rendered by the Circuit Court of Monroe County, in favor of the said Oscar G. Taylor against the said St. Louis & San Francisco Railroad Company.

Your orator would further state and show unto the Court that the defendant, Oscar G. Taylor, is insolvent, and that irreparable wrong and injury would result to your orator if the said Taylor be allowed to collect the judgment against the defendant Railroad Company, should the same be affirmed in the State Supreme Court.

Your orator would further show unto the Court that it believes that the prosecution of the said law suit against the said Railroad

Company by the said Taylor in the State Circuit Court is in violation of the said Taylor's contract with your orator and is a legal fraud upon the rights of your orator.

To the end therefore that the defendant may, if he can, show why your orator should not have the relief hereby prayed and may, according to the best and utmost of his knowledge and belief, full, true, and direct answer make to the allegations in the bill; but not under oath, answer under oath being expressly waived, your orator prays for the relief herein, before prayed in the original bill of complaint filed herein on the 2nd day of May, A. D. 1910, reference to which is hereby made, the same as set forth herein in full, and the prayer for relief in which is hereby reiterated herein in full; and for such other, further, different, and general relief, as your Honors may deem meet and proper in the premises; and that at the October Term of said Court, your Honors will issue a temporary restraining order or injunction, or some other proper order, directed to the said Oscar G. Taylor, enjoining him from attempting to collect any judgment he may obtain against the said Railroad Company; or in some other way duly protecting the rights of your orator until a final hearing of this cause upon its merits, and as in duty bound, your orator will ever pray.

SYKES & SYKES,
Sooicitors [Solicitors] for Complainant.

STATE OF MISS.,
Monroe County:

I, E. O. Sykes, Jr., after being duly sworn upon my oath depose and say that I am one of the solicitors for complainant, Wells Fargo & Company, and as such make, and am authorized to make this affidavit, that I have read the foregoing supplemental bill and am acquainted with the facts therein stated and that they are true as I verily believe.

E. O. SYKES, JR.

Sworn to and subscribed before me this the 3rd day of September, A. D. 1910.

L. E. OLDHAM, *Clerk*,
[SEAL.] By R. D. CRENSHAW, *D. C.*

Indorsed: Supplemental Bill. Filed September 3rd, 1910.

31 *Petition for Temporary Injunction.*

In the Circuit Court of the United States for the Eastern Division of the Northern District of Mississippi, October Term, 1910.

No. 158.

WELLS FARGO & COMPANY

vs.

OSCAR G. TAYLOR.

To the Honorable the Judges of the Circuit Court of the United States for the Eastern Division of the Northern District of Mississippi:

Your petitioner, Wells Fargo & Company, prays this Honorable Court that it issue a temporary injunction, enjoining and restraining the defendant, Oscar G. Taylor, from in any way attempting to collect any judgment obtained, or which may be obtained by him in the State Circuit Court, or the Supreme Court of Mississippi in the suit of Oscar G. Taylor vs. the Saint Louis & San Francisco Railroad Company.

Petitioner alleges that unless it is granted a temporary injunction said Taylor may collect a judgment in the above case, which would result in irreparable loss and damage to your petitioner.

SYKES & SYKES,
Att'ys Comp.

Indorsed: Petition for Temporary Injunction. Filed September 27, 1910.

32 In the United States District Court for the Eastern Division of the Northern District of Mississippi.

No. 158. In Equity.

WELLS FARGO & COMPANY

vs.

OSCAR G. TAYLOR.

The complainant in this cause, Wells Fargo & Company, filed, in proper form, its application for a temporary injunction to enjoin the defendant, Oscar G. Taylor, from collecting a judgment in his favor and against Complainant, entered in the Circuit Court of Monroe County, Mississippi.

The granting of the temporary injunction is resisted by the defendant on the ground that under Section 5 of the Employers' Li

bility Act of 1908, the contract between the Defendant and Complainant, forming the basis of this litigation, is void; and that the constitutionality of the said Act is fully sustained in the case of Mondau against Railroad Company.

Complainant, in answer to this contention, takes the position that because the said contract wes entered into before the enactment of the said Employers' Liability Act of 1908, it (the contract) cannot be affected thereby, and that this act could only apply to contracts made after its enactment; otherwise it would be unconstitutional, as impairing the obligation of a contract, and therefore retroactive.

That if said contract was lawful when entered into, it cannot be rendered unlawful by subsequent legislation.

That as defendant's suit was not based upon said Act, but upon the common law, said act is not applicable to this case.

That the Act only applies to common carriers by railways.

The application concludes with the statement that irreparable injury will be done complainant unless the temporary injunction is granted.

33 It is not conceived the duty of the Court, upon the application for a temporary injunction, to decide the contentions of counsel as to the applicability of the Employers Liability Act of 1908 to this controversy; its constitutionality and bearing upon the contract of the parties.

Complainant represents to the Court that the defendant, Taylor, is hopelessly insolvent, and if permitted to collect his judgment in the State Court, Complainant, if successful in this suit, would be utterly unable to reap the fruits of his victory, and so would suffer irreparable injury. The Court is bound to accept this statement as true until denied.

Should the temporary injunction be granted, what is then the situation of this defendant? His right to recover remains the same, and under the protection of an ample injunction bond, he can suffer no real damage.

It is considered the duty of the Court to grant the injunction as prayed, even though complainant's right to permanent relief be doubtful, as its effect in this instance would only maintain a status quo pending adjudication, and is a question resting upon the inconvenience to be caused the parties. The defendant retains his proper remedy, and, if successful, the complainant is solvent and able to respond. The complainant, if denied the injunction, and the defendant permitted to collect the judgment, must rely solely on defendant's personal responsibility. It appears that the defendant is hopelessly insolvent.

Let a temporary injunction issue as prayed upon the Complainant entering into a good and sufficient bond in the sum of $1,000.00.

H. C. NILES,
Judge.

Indorsed: Order granting Temporary Injunction. Filed July 15, 1912.

34 In the District Court of the United States for the Eastern Division of the Northern District of Mississippi.

The President of the United States, to Oscar G. Taylor, and his agents, attorneys, and all persons for him concerned, and to the Marshal of the Northern District of Mississippi, Greeting:

In our District Court of the United States for the Eastern Division of the Northern District of Mississippi at Aberdeen, Wells Fargo & Company has filed its bill for relief and for a temporary injunction restraining you from attempting to collect any judgment you may have obtained against the St. Louis & San Francisco Railroad Company in the Circuit Court of Monroe County, Mississippi, and has obtained the same, returnable before said Court, sitting as a Court of Equity, at Aberdeen, on Monday, the 7th day of October, A. D. 1912;

Therefore, we command, and strictly enjoin upon you, the said Oscar G. Taylor, your agents, attorneys, and all other persons for you concerned, to desist from attempting to collect any judgment you may have obtained against the St. Louis & San Francisco Railroad Company in the Circuit Court of Monroe County, Mississippi, until the order or decree of our said District Court be made to the contrary.

This obey at your peril. And we commond you, the said Marshal, to deliver to said defendant a copy of this writ, and have the same before our said Court at the time and place aforesaid.

Witness, The Honorable H. C. Niles, Judge of said Court, and the seal thereof at Aberdeen, in said Division and District, this the 19th day of July, A. D. 1912.

L. E. OLDHAM, *Clerk*,
By R. D. CRENSHAW, *D. C.*

[SEAL.]

35 *Marshal's Return.*

Received this Writ at Aberdeen, July 25th, 1912, and on the same day at Aberdeen, I executed the same on the within named Oscar G. Taylor, defendant, by delivering to him in person a true copy of the same.

This the 25th day of July, A. D. 1912.

A. M. STORER,
U. S. Marshal,
By L. B. PHILLIPS,
Deputy.

Indorsed: Temporary Injunction. Returned and filed July 27, 1912.

Answer of O. G. Taylor, the Above Named Defendant to the Original and Supplemental Bills Exhibited Against Him by Above Complainants.

In the United States District Court for the Eastern Division of the Northern District of the State of Mississippi.

No. 158.

WELLS FARGO & CO., Complainants,

vs.

OSCAR G. TAYLOR, Defendant.

The defendant now and at all times hereafter saving and reserving to himself all and all manner of benefits and advantages of exceptions which may be had or taken to the many errors, uncertainties, imperfections and insufficiencies in the complainant's said bill and supplemental bills of complaint contained, for answer thereto after the over-ruling of his demurrer to said bills and supplemental bills or unto so much or such parts thereof as this defendant is advised that it is material or necessary for him to make answer unto, by consent of court, answering says:

36 1st. He denies that he signed and entered into a written agreement as alleged in the bill in this cause and as alleged in the supplemental bill.

2nd. Denies that at the trial of the suit of O. G. Taylor vs. St. Louis & San Francisco Railroad Co., in the Circuit Court of Monroe County, Miss., the Complainant proved by L. B. Pettigrew a witness, that the said O. G. Taylor had duly signed the contract Exhibit "B" to the Bill and supplemental bill in this cause. Avers the fact to be that said Pettigrew only testified to the fact that Taylor did sign the exhibit "B" before mentioned; and states that at said trial O. G. Taylor testified that he had not signed said contract.

3rd. Submits the fact to be that the contract, Exhibit "A" to the original bill in this cause made between the complainant and the St. Louis & San Francisco Railroad Co., and the Messenger's Agreement, Exhibit "A," alleged to have been made by Complainant and Defendant, and upon which contract and alleged agreement Complainant seeks the relief prayed for in its original and supplemental bills are violative of the Act of Congress of the United States, 35th Statutes 65, Chapter 149, known as the Employers Liability Act and non-enforce-able in the Courts of the United States of America.

4th. Avers the fact to be that at the time of the accident to defendant, Taylor, on March 8th, 1909, and for which he recovered judgment in the Circuit Court of Monroe County, Miss., against the St. Louis & San Francisco Railroad Co., and which judgment was affirmed by the Supreme Court of the State of Miss., the St. Louis & San Francisco Railroad Co., and the Complainant were common

carriers by railroad and engaged in commerce between the State of — the United States of America; and that the defendant, O. G. Taylor, at the time of the injury was engaged in handling interstate shipments for Complainant and the St. Louis & San Francisco Railroad Co.

37 5th. Avers that the injury, for which defendant recovered judgment in the Courts of the State of Miss., was caused by the negligence of complainant's agents or employees, to wit, the St. Louis & San Francisco Railroad Co.

6th. Denies that the prosecution of the suit against the St. Louis & San Francisco Railroad Co., was in violation of the alleged contract with complainant and was a legal fraud upon the legal rights of complainant. But states the fact to be that the contract Exhibit "A" and the messenger's agreement, Exhibit "B," which complainant seeks to enforce in this Court is contrary to and in violation of an Act of Congress of United States of America as passed and enacted by Congress on April 22nd, 1908, 35th Statutes-at-Large, 65, Chapter 149; and is unenforce-able in the Courts of the United States of America.

And now having fully answered Defendant prays to be hence dismissed with his costs in this behalf most wrongfully sustained.

PAINE & PAINE,
Attorneys for Respondent.

STATE OF MISS.,
Monroe County:

O. G. Taylor, being duly sworn, deposeth and says that he is well acquainted with the answer in this cause; that he has read the same and knows the contents thereof; that the same is true to the knowledge of deponent, except as to matters therein stated to be alleged on information and belief and as to those matters he believes them to be true.

Witness my signature this the 28th day of June, 1913.

O. G. TAYLOR.

Sworn to and subscribed before me this the 28th day of June, 1913.

R. D. CRENSHAW,
[SEAL.] *U. S. Com'r N. Dist. of Miss.*

Indorsed: Answer of Defendant to O. & S. Bills. Filed June 28, 1913.

38 In the District Court of the United States for the Eastern Division of the Northern District of the State of Mississippi.

WELLS FARGO & CO.

vs.

OSCAR G. TAYLOR.

Comes now the said Respondent after the Mandate of the Circuit Court of Appeals in this cause has been filed, and moves the Court in conformity with said Mandate and the opinion therein to dissolve the injunction and dismiss the bill and tax complainant with all the costs.

PAINE & PAINE,
Atty's for Respd.

May 24th, 1915.

Indorsed: Motion of Respondent to dissolve injunction, dismiss bill and tax complainant with costs. Filed May 24th, 1915.

Motion to Amend Bill.

In the District Court of the United States in and for the Eastern Division of the Northern District of Mississippi.

WELLS FARGO & CO., Complainant,

vs.

OSCAR G. TAYLOR, Defendant.

Complainant, by its solicitors, now moves the Court that it be allowed to amend its Original and Supplemental Bills in this cause as follows, viz:

On page No. 2 of the Original Bill after the paragraph which reads as follows: "Your orator would further state and show unto the Court that on April 20th, 1909, the defendant, Oscar G. Taylor,
39 and your orator entered into a written agreement duly signed and executed by the said Oscar G. Taylor, under and by virtue of which agreement Oscar G. Taylor became an employee of your orator whose duty it was as said employee to accompany such express matters of your orator on the passenger trains of the Saint Louis and San Francisco Railroad Company between Aberdeen and Amory, towns in Monroe County, Mississippi," to insert the following amendment. Your orator would further state and show unto the Court that the defendant, Oscar G. Taylor, was not employed by the Saint Louis and San Francisco Railroad Company at this time, or never became an employee of said Railroad Company while he was an employee of said Express Company and that the

said defendant, Oscar G. Taylor, was allowed to ride on the trains of the said Railroad Company solely by virtue of his being in the employ of the Express Company.

On Page No. 3 of the Original Bill after the paragraph reading as follows, viz: "Your orator further states and shows unto the Court that on or about the 10th day of February, 1910, the defendant, Oscar G. Taylor, brought a suit against the Saint Louis and San Francisco Railroad Company in the Circuit Court of the County of Monroe, State of Mississippi, for the sum of Twenty Thousand Dollars ($20,000.00) on account of the personal injuries sustained by him in the wreck of train of Saint Louis and San Francisco Railroad Company as above set Out,"—to insert the following amendment, viz: that the said suit of Oscar G. Taylor in the said Circuit Court of Monroe County, Mississippi, was not instituted under the "Employers Liability Act of 1908" and that the said Declaration in said suit alleged and charged that the said Oscar G. Taylor at the time of his injury was an employee of the Express Company. It was not claimed or charged in said suit that the said Oscar G. Taylor was in the employ of the Railroad Company at the time of said injury. A copy of the said Declaration filed in the Circuit Court of Monroe County, Miss., is hereto attached as Exhibit "A" to this motion and asked to be taken and considered as a part of same.

40 Complainants would further state and show unto the Court that there has not yet arisen in this case any controversy about the said Taylor only being employed by the said Express Company except by a construction of the written contracts between the Express Company and Taylor and the Express Company and the Railroad Company.

Wherefore Complainant states that it is necessary for it to be allowed to make these amendments in order that substantial justice may be done it in said cause.

WELLS FARGO & COMPANY,
By E. O. SYKES,
Its Attorney of Record.

SYKES & SYKES,
Sols. for Motion.

EXHIBIT "A" TO MOTION.

State of Mississippi, Circuit Court, Monroe County, March Term, 1910.

O. G. TAYLOR, Plaintiff,

VS.

THE ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, Defendant.

Plaintiff by attorneys complains of defendant, a railroad corporation conducting its business in Monroe County, Miss., summoned, etc., in an action for damages and alleges first.

That the defendant is now and has been for the past twelve months and longer operating its train of cars and locomotives over its line of railroad from Aberdeen, Miss., to Amory, Miss., and other points in Mississippi. That Aberdeen is one of the termini of defendant's branch railroad line and Amory is the other terminus. That Amory, Miss., is the terminus of said branch road with the main line of defendant's railroad system through the State of Mississippi.
41 That at Amory, Miss., all expressage from Aberdeen and to Aberdeen is transferred from and to the Aberdeen Branch before mentioned.

Second. That the Wells Fargo Express Co. has been permitted by its contract for value with the defendant up to the 1st day of Jan., 1910, to ship its expressage to Aberdeen and from Aberdeen, Miss., in a car furnished by the defendant; that plaintiff was employed by the said Express Company as its messenger to accompany on the train of cars all expressage shipped to and from Aberdeen, Miss., to and from Amory, Miss., and that under said contract defendant permitted plaintiff to accompany such expressage to and from Aberdeen, Miss., and to and from Amory, Miss., on the train upon which it was transporting such expressage.

Third. That on the 8th day of Dec., 1909, while on the cars of defendant with permission of defendant and while in the employ of the Wells Fargo Express Co. and while in the discharge of his duties as its messenger and while said cars of said train being a mixed train, carrying passengers and freight defendant was making a trip from Aberdeen, Miss., to Amory, Miss., and being run at a rapid speed and without any negligence on the part of plaintiff but that solely and by reason of defendant's negligence, its agents and servants and in utter disregarrd of its duty in reference to the construction and maintaining its railroad and tracks and trestling, a trestling East of Aberdeen, Miss., which trestling was so negligently, carelessly and improperly and defectively constructed, inspected and maintained that said track of defendant and said trestling aforesaid spread, broke and gave way and the car in which plaintiff was riding and plaintiff were precipitated through said trestle the ground beneath said trestling and plaintiff's left ankle was broken and permanently injured and his body otherwise seriously bruised and injured, from which injuries he became and continues to be sick, sore, maimed and disordered and suffered and still suffers great
42 pain and distress and that he has been and will permanently be incapacitated and prevented from carrying on his usual or former occupation that of an express messenger from which he was receiving Twenty Seven Dollars and fifty Cents ($27.50) per month and he has been necessitated to expend sums of money, to-wit, Two Hundred and Fifty Dollars ($250.00) in endeavoring to be cured of his said injuries and will hereafter be necessitated to expend other and larger sums of money in endeavoring to be cured of his said injuries. To his damage Twenty Thousand Dollars ($20,000.00) and Plaintiff sues.

And Plaintiff also sues defendant for this, to wit: that the defendant is now and has been for the past twelve months and longer

operating its trains of cars and locomotives over its line of railroad from Aberdeen, Miss., to Amory, Miss., and other points in Miss. That Aberdeen is one of the termini of defendant's branch railroad line and Amory, Miss., the other terminus. That Amory, Miss., is the terminus of said branch road with the main line of the defendant's railroad system through the State of Miss. That at Amory, Miss., all expressage from Aberdeen and to Aberdeen, Miss., is transferred to and from the Aberdeen Branch road aforementioned.

Second. That the Wells Fargo Express Co. has been permitted by contract of value up to the 1st of Jan., 1910, to ship its expressage from Aberdeen and to Aberdeen, Miss., in a car furnished by the defendant. That plaintiff was employed on the 8th day of December, 1909, by said Express Co. as its messenger to accompany on the train of cars of defendant all expressage shipped to and from Aberdeen, Miss., and to and from the City of Aberdeen, Miss., and that under the said contract the defendant permitted to accompany said Expressage (to and from) Aberdeen, Miss., and to and from Amory, Miss., on the train upon which it was transporting such expressage.

Third. That on the 8th day of December, 1909, while on the cars of defendant with permission of defendant, and while in the
43 employ of the Wells Fargo Co., and while in charge of duties as its messenger and while said cars of defendant were making a trip from Aberdeen, Miss., to Amory, Miss., and being run at a rapid rate of speed and without any negligence on part of the plaintiff but that solely and by reason of defendant's negligence, its agents and servants and in utter disregard of its duty in reference to the cars of defendants attached to the engine propelling the cars composing the train in which plaintiff was making the trip on the day and date aforementioned, said train being a mixed train, that is hauling passengers and freight, and which train of cars was so carelessly, negligently, insecurely, and defectively constructed, inspected and maintained that they broke, gave way and fell apart and thereby caused the car in which plaintiff was making the trip as aforementioned to be thrown from a trestling to the ground beneath said trestling and plaintiff's left ankle was broken and permanently injured and his body otherwise seriously bruised and injured from which injuries he became and continues to be sick, sore, maimed and disordered and suffered and still suffers great pain and distress and that he has been and will permanently be injured and wholly incapacitated and prevented from carrying on his usual or former occupation, that of an express messenger from which he was receiving $27.50 per month and he has been necessitated to spend large sums of money, to-wit, $250.00, in endeavoring to be cured of his said injuries and will hereafter be necessitated to spend other and larger sums of money in endeavoring to be cured of his said injuries. To his damage $20,000.00 and therefore he sues.

PAINE & PAINE,
Attorneys for Plaintiff.

Indorsed: Motion to Amend Bills. Filed June 26, 1915.

44 *Decree Overruling Motion of Defendant (Respondent) to Dissolve the Injunction, Dismiss Bill and Tax Complainant With Costs.*

In Equity. No. 158.

WELLS FARGO & Co., Complainant,

vs.

OSCAR G. TAYLOR, Defendant.

At the regular April, 1916, Term of this Court, and on a regular day of the term, this cause came on to be heard on Motion of Respondent to dissolve the injunction and dismiss the bill and tax Complainant with all the costs; and was argued by counsel, and taken under consideration by the Court to be decided in vacation; and thereupon, upon consideration thereon in vacation, it was ordered, adjudged and decreed as follows, viz: That said motion be, and the same hereby is, in all things overruled.

Ordered, adjudged and decreed this the 19th day of September, 1916.

H. C. NILES,
Judge.

To which the Respondent then and there excepts.

Indorsed: Decree overruling Motion to Dismiss, etc. Filed Sep. 23, 1916.

In Equity. No. 158.

WELLS FARGO & Co., Complainant,

vs.

OSCAR G. TAYLOR, Defendant.

This cause came on to — heard at this the regular April, 1916, Term of this Court, and on a regular day of said Term, on motion of complainant to amend its original and supplemental bills as specified in said motion; and the same was argued by counsel
45 and taken under consideration by the Court to be decided in vacation; and thereupon, upon consideration thereof in vacation, it was ordered, adjudged and decreed as follows, viz: That said motion be, and the same hereby is, in all things sustained, and said complainant is allowed to amend its bill as prayed, to-wit:

On Page Two of the Original Bill after the paragraph which reads as follows: "Your orator would further state and show unto the Court that on April 20th, 1909, the defendant, Oscar G. Taylor, and your orator entered into a written agreement duly signed and executed by the said Oscar G. Taylor, under and by virtue of which,

your orator whose duties it was as said employee to accompany such express matters of your orator on the passenger trains of the Saint Louis & San Francisco Railroad Company between Aberdeen, and Amory, Towns in Monroe County, Miss., to insert the following amendment:

Your orator would further state and show unto the Court that the defendant, Oscar G. Taylor, was not employed by the Saint Louis & San Francisco Railroad Company at this time, or never became an employee of said Railroad Company while he was an employee of said Express Company and that the said defendant, Oscar G. Taylor, was allowed to ride on the trains of the said Railroad Company solely by virtue of his being in the employ of the Express Company."

On Page Three of the Original Bill after the paragraph reading as follows: "Your orator further states and shows unto the Court that on or about the 10th day of February, 1910, the defendant, Oscar G. Taylor, brought a suit against the Saint Louis and San Francisco Railroad Company in the Circuit Court of the County of Monroe, State of Mississippi, for the sum of $20,000.00 on account of the personal injuries sustained by him in the wreck of the train of the Saint Louis & San Francisco Railroad Company as above set out" to insert the following amendment:

"That the said suit of the said Oscar G. Taylor in the said Circuit Court of Monroe County, Mississippi, was not instituted under
46 the 'Employers Liability Act of 1908' and that the said declaration in said suit alleged and charged that the said Oscar G. Taylor at the time of his injury was an employee of the Express Company. It was not claimed or charged in said suit that the said Oscar G. Taylor was in the employ of the Railroad Company at the time of said injury."

And it is further ordered by the Court that the defendant have sixty days in which to file an answer to the amended bill of complaint, said sixty days to commence to run from the date of the filing of said amended bill.

Ordered, adjudged and decreed this the 19th day of September, 1916.

H. C. NILES,
Judge.

To the above decree of the Court, the defendant here and now excepts.

Indorsed: Decree allowing Complainant to Amend Bills. Filed Sept., 23, 1916.

Amendment to Original Bill in Equity.

In the District Court of the United States for the Eastern Division of the Northern District of Mississippi.

No. 158. In Equity.

WELLS FARGO COMPANY,

vs.

OSCAR G. TAYLOR.

And now September 21st, 1916, Complainant, by leave of Court, amends its original Bill of complaint by adding to the said bill on Page 2 after the paragraph which reads as follows:

"Your orator would further state and show unto the Court that on April 20th, 1909, the defendant, Oscar G. Taylor, and
47 your orator entered into a written agreement, duly signed and executed by the said Oscar G. Taylor, under and by virtue of which agreement, Oscar G. Taylor became an employee of your orator, whose duty it was as said employee to accompany such express matter of your orator on the passenger trains of the Saint Louis & San Francisco Railroad Company between Aberdeen and Amory, Towns in Monroe County, Miss."

the following paragraph and averments, viz:

(1) "Your orator would further state and show unto the Court that the defendant, Oscar G. Taylor, was not employed by the Saint Louis & San Francisco Railroad Company at this time and never became an employee of said Railroad Company while he was an employee of Wells Fargo & Company, and that the said defendant, Oscar G. Taylor, was allowed to ride on the trains of the said Railroad Company solely by virtue of his being in the employ of the said Complainant Express Company."

Complainant further amends its original bill of complaint by adding to the said bill on Page 3 after the paragraph which reads as follows:

"Your orator further states and shows unto the Court that on or about the tenth day of February, 1910, the defendant, Oscar G. Taylor, brought a suit against the Saint Louis & San Francisco Railroad Company in the Circuit Court of Monroe County, Miss., for the sum of $20,000.00 on account of the personal injuries sustained by him in the wreck of the train of the Saint Louis & San Francisco Railroad Company, as above set out."

the following paragraph and averments, viz:

(2) "That the said suit of Oscar G. Taylor in the said Circuit Court of Monroe County, Mississippi, was not instituted under the

Employers Liability Act of 1908, and that the said declaration in said suit alleged and charged that the said Oscar G. Taylor
48 at the time of his injury was an employee of your orator, Wells Fargo & Company. It was not claimed nor charged in said suit that the said Oscar G. Taylor was in the employ of the Railroad Company at the time of said injury. A copy of the said declaration filed in the circuit Court of Monroe County, Mississippi, is hereto attached as Exhibit "A" to this amendment, and asked to be taken and considered as a part of the same."

Also the following amendment which follows immediately after the preceding one, viz:

(3) "Complainant would further state and show unto the Court that there has not yet arisen in this case any controversy about the said Oscar G. Taylor only being in the employ of the said Wells Fargo Company, except that arising from a construction of the written contract between the said Express Company and the said Taylor, and the said Express Company and the Saint Louis & San Francisco Railroad Company."

WELLS FARGO & COMPANY,
By C. H. GARDINER,
Sec'ty.

Solicitors for Complainant.

Sworn to *me before* this 25th day of September, 1916.
[NOTARIAL SEAL] JAY D. SARGEANT,
Notary Public, New York County, N. Y.

My commission expires March 30, 1918.

STATE OF NEW YORK,
County of New York:

C. H. Gardiner, being duly sworn, deposes and says that he is the Secretary of the corporation, Wells Fargo & Company, the complainant above named, and is familiar with its business; that he has read the foregoing amendments to the bill of complaint herein and knows the contents thereof, and that the same are true to the knowledge of deponent, except as to the matters therein stated to be
49 alleged on information and belief, and as to those matters he believes them to be true.

C. H. GARDINER.

Subscribed and sworn to before me this the 25th day of September, 1916.
[SEAL] JAY D. SARGEANT,
Notary Public, New York County, New York.

My commission expires on the 30th day of March, 1918.

Indorsed: Amendments to Original Bill. Filed Sept. 27, 1916.

Answer of O. G. Taylor to the Bill, Supplemental Bill, and Amended Bill, After the Case Has Been Reversed and Remanded by the Circuit Court of Appeals.

In the United States District Court for the Eastern Division of the Northern District of the State of Mississippi.

In Equity.

WELLS FARGO & Co., Complainant,

vs.

OSCAR G. TAYLOR, Defendant.

The defendant now and at all times hereafter saving and reserving to himself all and all manner of benefits and advantages of exception which may be had or taken to the many errors, uncertainties, imperfections and insufficiencies to the said complainant's bill, supplemental bill and amended bill, for answer thereto, after the over ruling of defendant's objection to the amendments of the original and supplemental bills, answering says:

50 I.

He denies that he signed and entered into a written agreement as alleged in the bill, supplemental bill and amended bill.

II.

Denies that the trial of the suit of O. G. Taylor, vs. the St. L. & S. F. R. R. Co., in the Circuit Court of Monroe County, Miss., the complainant proved by L. B. Pettigrew, a witness, that the said O. G. Taylor had duly signed the contract, Exhibit "B" to the Bill in this cause. Avers the fact to be that said Pettigrew only testified to the fact that Taylor did sign the Exhibit "B" before mentioned; and states the fact to be further that the said defendant at said trial testified that he had not signed said contract.

III.

Submits the fact to be that the contract Exhibit "A" to the original bill in this cause made between the complainant and the St. L. & S. F. R. R. Co., and the Messenger's Agreement & Exhibit "B" alleged to have been made between Complainant and the Defendant and upon which contract and alleged agreement Complainant seeks the relief prayed for in its suit are violative of the Act of Congress of the United States, 35th Statutes, 65, Chapter 149, known as the Employers' Liability Act of 1908 and amendments and are non-enforcable in the Court of the United States of America.

IV.

Avers the fact to be that at the time of the accident to the defendant, Taylor, on March 8th, 1909 and for which he recovered in the Circuit Court of Monroe County, Mississippi, against the St. L. & S. F. R. R. Co., and which judgment was affirmed by the Supreme Court of the State of Miss., the St. L. & S. F. R. R. Co., and the complainant were common carriers by railroad and engaged in
51 handling commerce between the States of the United States of America; and that the defendant, O. G. Taylor, at the time of the injury was engaged in handling interstate commerce for complainant and the St. L. & S. F. R. R. Co.

V.

Avers the fact to be that the injury for which the defendant recovered judgment in the State Courts of Miss., was caused by the negligence of Complainant's agents or employee or partner, to-wit, the St. L. & S. F. R. R. Co.

VI.

Denies that the prosecution of the suit by defendant against the St. L. & S. F. R. R. Co., was in violation of the alleged contract with complainant and was a legal fraud upon the rights of complainant; but states the fact to be that the Contract, Exhibit "A", and the Messenger's Agreement, Exhibit "B", which the complainant seeks to enforce in this court is contrary to and in violation of the Act of Congress of the U. S. of America as passed and enacted by Congress on April 22nd, 1908, 35th Statutes at Large, 65, Chapter 149; and is unenforceable in the Court of the United States of America.

VII.

Respondent avers the fact to be that at the time of the injury to him the complainant and the St. L. & S. F. R. R. Co., were partners or co-proprietors engaged in the handling of inter-state commerce by railroad; and that respondent was an employee of the complainant and the St. L. & S. F. R. R. Co., at the time of his injury.

IX.

Respondent submits to the Court that it appears from the bill and exhibits thereto that the complainant originally sought its remedy in the Circuit Court of Monroe County, Miss., and that on a
52 judgment being entered against it by the Court of Miss., it failed and refused to appeal the judgment so rendered to the Supreme Court of the State of Miss., which said Court is the final appellate court of the State of Miss. The Complainant thus voluntarily abandoned its rights in the State Court of Miss., by failing to appeal the judgment to the Supreme Court of the State of Miss.,

and to the U. S. Supreme Court, and began this suit in this Hon. Court. Complainant states the fact to be that by abandoning the State Court after having voluntarily sought its jurisdiction, without having first exhausted its rights by appeal to the Supreme Court of the State of Miss., this Court is without jurisdiction to maintain the suit.

X.

Complainant states the fact to be that this Court is without jurisdiction to maintain the present suit because by taking jurisdiction and granting relief under the bill, supplemental bill and amended bill in this cause, the Court would be acting contrary to the statutes made and approved by the Congress of the U. S. of America by interfering with the jurisdiction of the State Court of Mississippi, previously acquired in the case of O. G. Taylor vs. the St. L. & S. F. R. R. Co., in which case the complainant voluntarily made an appearance and on judgment being entered against it failed to prosecute its appeal to the State Court of Miss.

XI.

Respondent further avers that under the decree of reversal and remand of this cause by the Circuit Court of Appeals this Court is without authority to allow the original and supplemental bills to be amended.

XII.

That the decree of reversal by the Circuit Court of Appeals of date, February 8th, 1915, was a final decree upon the merits
53 of the litigation and terminated the rights of Complainant in this Court until after reversal of the decree of the Circuit Court of Appeals by the Supreme Court of the United States of America.

XIII.

That the decree in this cause by the Circuit Court of Appeals, of date February 8th, 1915, was a final decree deciding the case upon its merits and was alone reviewable by the Supreme Court of the United States and hence the District Court has no authority to allow the amendments granted the complainant by the decree of the Court of September 23, 1916. Avers the facts to be that this Court erred in overruling the motion of the respondent to dismiss the bill, dissolve the injunction, etc., which said motion was made in conformity with the decree of the Circuit Court of Appeals in this cause of date February 8th, 1915.

XIV.

Avers the fact to be that this Court has no authority to sustain the motion of Complainant to be allowed to amend its original and supplemental bills, as decreed on Sept. 23, 1916.

XV.

And having fully answered the respondent prays that the bill be dismissed and the injunction dissolved and defendant go hence with his costs in this cause.

PAINE & PAINE,
O. G. TAYLOR.

Sworn to and subscribed before me this the 20th day of June, 1916.

W. J. MONETTE,
Notary Public.

[SEAL.]

Indorsed: Answer of O. G. Taylor to Amended Bill after Reversal and Decree Allowing Amendment. Filed September 27, 1916.

54 *Agreement.*

In the United States District Court for the Eastern Division of the Northern District of the State of Mississippi.

In Equity.

WELLS FARGO & Co.

vs.

OSCAR G. TAYLOR.

It is hereby agreed by and between both parties to this suit, that in case of another trial of same in this Court, either party may introduce and use as evidence on said trial all of the stenographer's notes together with the exhibits of the testimony taken at the first trial, or may use the notes of testimony of any witness, together with the exhibits as shown by said notes, and may use as evidence the notes and all papers of the case of O. G. Taylor vs. S. L. & S. F., which case was tried in the Circuit Court of Monroe County, Miss.

It is further agreed that either side may also introduce other oral testimony in said cause.

Objections may be made at the hearing of said cause to either the testimony introduced orally or to that read from the Stenographer's notes, or to both.

SYKES & SYKES,
Solicitors for Complainant.
PAINE & PAINE,
Solicitors for Defendant.

Indorsed: Agreement of Counsel as to Introduction of Certain papers. Filed October 5, 1916.

55 *Narrative Statement of the Testimony.*

In the United States District Court for the Eastern Division of the Northern District of the State of Mississippi.

In Equity.

O. G. TAYLOR, Appellant,

vs.

WELLS FARGO & Co., Appellee.

Now comes O. G. Taylor, the appellant in the above styled cause and files this his statement of the evidence introduced at the hearing from the order granted in which an appeal has been granted.

L. B. PETTIGREW, a witness for appellee, testified as follows: that he testified at a former trial of this case in this court. That he employed O. G. Taylor as a messenger for the appellee and had a talk with him as to what he was doing at that time. That the appellant said at the time of the employment that he had been express messenger for the Southern Express Company. That Taylor made out the application for employment in which he stated that he had been express messenger for the Southern Express Company. That as far as he, Pettigrew, knew Taylor was not in the employ of the St. L. & S. F. R. R. Co., when he employed him for the complainant Express Company. That if he had been, he would have put it in the application blank. That at the time he employed Appellant he did not employ him as a joint agent of the Railroad Company and the Appellee but employed him exclusively for the Appellee to handle their express only. That he had the authority to employ Appellant and that none but an officer of the company had the authority to discharge him. The Route Agent of the Appellee had the right to control and direct Appellant's services. The St. L. & S. F. R. R. Co., had nothing to do with the employment of Taylor, the appellant. The St. L. & S. F. R. R. Co., had no
56 right to discharge the Appellant. The Appellee alone had the right to discharge him. That he had the right to discharge him. That he was not then in the employ of the Appellee. Witness had no knowledge of ever having read the contract made by appellee and the St. L. & S. F. R. R. Co., and that he did not know the contents of the said contract. That he employed other employees of the St. L. & S. F. R. R. Co., as agents for the Wells Fargo & Co., and quite a number of them were so employed as joint agents.

R. D. GRIFFIN, a witness for the appellee, testified as follows: That he was a conductor on the St. L. & S. F. R. R. Co., between Aberdeen and Amory, Miss., on the 8th of December, 1909, on which date the appellant was injured but was not on the train. The appellant was an express messenger for appellee and was not working

for the railroad at that time. That Lewis Griffin was baggage master on said train and appellant had nothing to do with the operation, the management or the work of the train. That the Conductor has charge of the train and that he kept the time slips of the train crew and makes out their time slips and that he had never made out any time slips for appellant. That the Conductor has nothing to do with the express men except to see that they conduct themselves right. That appellant was working as express messenger in the same car with the baggage man and in a car furnished by the St. L. & S. F. R. R. Co. That the said Railroad Co., furnished the heat and lights for the car and its means of locomotion, in which the appellant was riding. That the office of the Appellee was in the station house of the St. L. & S. F. R. R. Co., in Aberdeen, Miss. That the employees of the Railroad Company, on this branch train, were Conductor, Baggage-man, Fireman, Flagman, and Engineer.

Counsel for the Appellee the- offered in evidence the following:

57 Exhibits "A" and "B."

Exhibit "C" declaration in the case of O. G. Taylor vs. St. L. & S. F. R. R. Co., in the Circuit Court of Monroe County, Miss.

Exhibits "D," "E," "F," "G," "H," "J" and "K."

EXHIBIT "A."

Wells Fargo & Company.

Application for Employment.

ABERDEEN, MISS., April 20th, 1909.

I hereby make application to Wells Fargo & Company for employment in its express service, and that for that purpose have made and signed this application in my own hand writing.

In consideration of my employment, I agree to faithfully observe all rules and regulations of the Company, and all instructions that I may receive respecting the Company's business, promising to serve honestly, loyally, faithfully and to the best of my ability, refraining from the use of intoxicating liquors or other stimulants to excess; not to enter into any enterprise, association, society or business which will interfere with my duties to the company.

Furthermore, as I may be required to render service for the Company on and about the railroad, state and steamboat lines used by it for forwarding property, and knowing that such employment is hazardous, I agree to assume all risk of personal injuries which I may sustain in the course of my employment, whether occasioned by negligence or otherwise. And I further agree to furnish a fidelity bond acceptable to Wells Fargo & Company.

I understand that persons employed by the Company are not engaged for any particular time, and the Company reserves the right to terminate the services of any employee at pleasure.

Therefore, in executing this application, I acknowledge and agree to abide by such conditions, and accept employment subject to discharge at any time by the Company or its Agents, with pay to date of discharge.

58 Name in full: Oscar Greenberry Taylor.

Residence: Aberdeen, Miss.

Place and date of birth: Near Aberdeen in Monroe Co., May 7, 1862.

Parents' name and residence:

Father: Deceased.

Mother: Rebecca Taylor, Quincy, Miss.

Wife's name: Margaret Taylor.

My last employers, occupation and the reasons of their termination have been as follows:

From May, 1907, to April, 1909: in the service of the Southern Ex. Co.; Position, Messenger; Place, Aberdeen, Miss.; Reason for leaving, Still in Service.

By whom employed at present: Southern Express Co., G. W. Agee, Supt.

State what experience, if any, you have had in the express business, and whether you have ever been in the employ of this Company before: Two years as messenger.

Reference: Southern Express Co., G. W. Agee, Supt.

O. G. TAYLOR,
Applicant.

Witness:
L. B. PETTIGREW,
C. R. A.

EXHIBIT "B."

Agreement between Wells Fargo & Company and Oscar G. Taylor, omitted from the printed record, being heretofore printed at page 23 as Exhibit "B" to Bill of Complaint.

* * * * * * *

EXHIBIT "C."

Declaration in suit of O. G. Taylor vs. St. Louis & San Francisco R. R. Co., omitted from the printed Record, being heretofore copied at page 40 as Exhibit "A" to Motion to Amend Bill.

* * * * * * *

59 EXHIBIT "D."

Aberdeen Office, State of Miss., Dec. 10, 1909.

Wells Fargo & Co. Express, To O. G. Taylor, Dr.

In full for services to date, as Messenger, from 11/1, 1909, to 11/30, 1909 @ $27.50

Payment received,
(Signed) O. G. TAYLOR.

Examined and found correct by
(Signed) J. R. YOUNG,
Agent.

EXHIBIT "E."

Wells Fargo & Co. Express, To O. G. Taylor, Dr.

For Services as Messenger, Aberdeen Branch, May, 1909.... $27.50

Received payment,
Aberdeen office, Miss., 6/3, 1909.
(Signed) O. G. TAYLOR.

Examined by me and found correct.
(Signed) J. R. YOUNG,
Agent.

EXHIBIT "F."

Wells Fargo & Co. Express, To O G. Taylor, Dr.

July 1. For Messenger, Aberdeen & Amory $27.50

Received payment.
Aberdeen, Miss., Office, July 1, 1909.
(Signed) O. G. TAYLOR.

Examined by me and found correct.
(Signed) J. R. YOUNG,
Agent.

60 EXHIBIT "G."

Wells Fargo & Co. Express, To O. G. Taylor, Dr.

7/31. For Messenger Aberdeen & Amory, July 1 to 31, 1909 ..... $27.50

Received payment.
Aberdeen, Miss., Office, July 31, 1909.
(Signed) O. G. TAYLOR.

Examined by me and found correct.
(Signed) J. R. YOUNG,
Agent.

EXHIBIT "H."

Aberdeen, Miss., Office, August 31, 1909.

Wells Fargo & Co. Express, To O. G. Taylor, Dr.

In full for all services to date, as Messenger Amory & Aberdeen Rte., from Aug. 1, 1909, to 31, 1909, @..... $27.50

Payment received.
(Signed) O. G. TAYLOR.

Examined and found correct by

——— ———,
Agent.

EXHIBIT "J."

Wells Fargo & Co. Express, To O. G. Taylor, Dr.

For Salary Sept., as Messenger Aberdeen Branch..... $27.50

Received payment.
Aberdeen Office, State of Miss., Oct. 2, 1909.
(Signed) O. G. TAYLOR.

Examined by me and found correct.
(Signed) J. R. YOUNG,
Agent.

61 EXHIBIT "K."

Wells Fargo & Co. Express, To O. G. Taylor, Dr.

For Salary Mess., Mo. of October..... $27.50

Received payment.
Aberdeen Office, State of Miss., ...190...
(Signed) O. G. TAYLOR.

Examined by me and found correct.
(Signed) J. R. YOUNG,
Agent.

Respondent here objected to the Exhibits "A" and "B" and assigned the following causes:

1st. Because they are contrary to public policy; since by it the St. L. & S. F. R. R. Co., a common carrier by railroad, seeks to relieve itself from liability from the gross negligence of its agents and employees, on account of which gross negligence the defendant while lawfully on said train of said railroad company as an employee of said railroad company was injured.

2nd. Because the contract and messengers agreement is contrary to public policy because by it the Appellee, a common carrier by railroad, is seeking to relieve itself from liability of the gross negligence of its agents and employees or partner or co-proprietor, to-wit, the St. L. & S. F. R. R. Co.

3rd. Because it is void and unenforce-able as violative of the provisions of an Act of Congress of April 22nd, 1908, Chapter 149, 35th Statutes at Large, page 65, Sections 1 and 5 thereof, and amendments thereto.

The Respondent then moved the Court to dismiss the bill and dissolve the temporary injunction because

1st. The bill is without equity on its face.

62 2nd. Because the contract upon which appellee's case is based and under which is [it] seeks relief is contrary to public policy because by it the St. L. & S. F. R. R. Co., a common carrier by railroad, seeks to relieve itself from liability of the gross negligence of its agents and employees on account of which gross negligence the Respondent while lawfully on said train of said railroad company as an employee of said railroad company was injured.

3rd. Because the contract is contrary to public policy because by it the appellee, a common carrier by railroad is seeking to relieve itself from liability of the gross negligence of its agents and employees or partner or co-proprietor, to-wit, the St. L. & S. F. R. R. Co., in the course of its business, on account of which gross negligence, the Respondent while lawfully on said train of said Railroad Co., the agent or employee, or partner or co-proprietor of Complainant, was injured.

4th. Because the evidence discloses the fact that the Appellant was injured while handling interstate commerce and the messengers agreement, the basis of complainant's suit is void and unenforce-able as violative of the provisions of an Act of Congress of April 22nd, 1908, Chapter 149, 35th Statutes at Large, page 65, Sections 1 and 5 thereof, and amendments thereto.

5th. Because it is contrary to public policy and the comity of courts for this court to grant the prayer of relief of the bill for injunction restraining the respondent from issuing execution to collect a judgment obtained in the State Courts of Miss., against the St. L. & S. — R. R. Co., a court of concurrent jurisdiction with this District Court; as it would be an interference with the jurisdiction of the State Court first had and obtained in the above styled cause.

6th. Because by taking jurisdiction and granting the Complaint the relief prayed for with injunction restraining the Respondent from issuing execution to collect a judgment obtained by

63 him in the case against the St. L. & S. F. R. R. Co., in the State Courts of Miss., this Court would be acting contrary to the statutes made and approved by Congress, to-wit, Section 720 R. S.

7th. Because it appears from the record and the evidence in the case that the Complainant voluntarily sought the jurisdiction of the Circuit Court of the State of Miss., in the case of O. G. Taylor vs. St. L. & S. F. R. R. Co., requesting that it be made a defendant with

the said Railroad Co., and that upon being denied this by said Court the said Complainant did not exhaust its remedy given it in the State Court by appeal to the Supreme Court of Miss., on this adverse ruling but abandoned the same and filed this suit in the U. S. District Court.

8th. Because it appears from the evidence and record in this cause that the messenger's agreement between the Complainant and the Respondent and the contract between the Complainant and the St. L. & S. F. R. R. Co., was offered in evidence by the Railroad Co., in the case in the State Court of Miss., of Respondent vs. the St. L. & S. F. R. R. Co., and the messenger's agreement upon which the Complainant now seeks relief was held void and unenforceable by the Circuit and Supreme Courts of Miss., and no appeal was prosecuted to the Supreme Court of the U. S. from said judgment and the said judgment and rulings stand unreversed and this Court is bound by the construction and ruling and judgments of this State Court until reversed by the United States Supreme Court.

9th. Because it appears from the record in this cause that on the former appeal to the Circuit Court of Appeals in case No. 2716 that after the case was reversed by the Circuit Court of Appeals holding there was no equity on the face of the bill, the Complainant requested the Circuit Court of Appeals to permit an amendment to be made to the bill or to direct the District Court to allow an amendment,
64 which said request and motion was overruled by the Circuit Court of Appeals and since this was a final decree the District Court has no power or authority to grant the Complainant the right to amend the bill on reversal and the District Court on the remanding of this cause from the Circuit Court of Appeals should have sustained the motion of Respondent to dismiss the bill and dissolve the injunction.

Whereupon the District Court reserved its ruling until the Appellant should introduce and conclude his testimony.

Thereupon J. R. YOUNG, a witness for Respondent, testified as follows:

That he was employed in the year 1909 at Aberdeen, Miss., as the agent of the St. L. & S. F. R. R. Co., and the Appellee and was so employed at the time Appellant was injured in the wreck on the St. L. & S. F. R. R. Co. train. That Appellant handled interstate and intrastate express matter between Amory and Aberdeen, Miss. That the Appellant also helped and assisted in loading and unloading baggage on every trip that he made. This fact was known to the witness as agent for the St. L. & S. F. R. R. Co. That the Appellee was furnished a room cut off and apart from the business of the Railway Company and paid for the space in the depot of the St. L. & S. F. R. R. Co., at Aberdeen, Miss., for its express matter. That he was the joint agent for the railroad company and the Appellee but kept separate accounts. That Appellant was employed by the Appellee as messenger and was not in the employ of the Railway Company, so far as he knew. That whatever handling of baggage was done by Appellant was done as an accommodation for the

baggage master on the train and that the Express Company paid his, Taylor's salary so far as he knew, and the railroad company did not pay him one cent.

65 Respondent here offered in evidence the transcript of the stenographic notes of all the evidence taken on the first trial of this cause of the testimony of Pettigrew and O. G. Taylor, the Appellant, also agreements and testimony taken on the trial as shown by the transcript of said stenographic notes taken on said former trial.

Narrative Statement of Testimony.

"In the District Court of the United States for the Eastern Division of the Northern District of Mississippi.

In Equity.

O. G. TAYLOR, Appellant,

vs.

WELLS FARGO & Co., Appellee.

Statement of the Evidence.

Now comes O. G. Taylor, defendant in the above styled and numbered cause and filed this his statement of the evidence introduced on the hearing, from the order granted in which an appeal has been taken:

L. B. PETTIGREW, a witness for the Appellee, being duly sworn, testified as follows:

That he is not at this time connected with the Appellee. But was chief route agent for it during 1909. That he is acquainted with the Appellant. Aberdeen, Miss., was in his division in 1909 and he hired some of the express messengers at that time. That he employed O. G. Taylor as express messenger for Appellee. He then identified the Application for Employment signed by O. G. Taylor which he stated O. G. Taylor signed and that he signed as witness. That it was signed in the office of the agent for the St. L. & S. F. R. R. Co., on April 20th, 1909, in Aberdeen, Miss. That the Appellant examined it before signing it. Which application is offered in evidence as Exhibit "A." Witness examined and identified a paper marked Exhibit "B" styled Wells Fargo & Co.

66 Messenger's Agreement; that this agreement was also signed by O. G. Taylor in his presence. That appellant examined it before signing and was signed by appellant in the office of the agent of the St. L. & S. F. R. R. Co., in Aberdeen, Miss. And offered the same in evidence as Exhibit "B."

Counsel for the Appellant objected to the introduction of this contract, Exhibit "B," and assigned the following reasons:

1st. Because it is contrary to public policy, because by it the St. L. & S. F. R. R. Co., a common carrier, attempts to relieve itself from liability for the gross negligence of its agents and employees in the course of its business, on account of which gross negligence the Appellant, as express messenger while lawfully on said train of said railroad company by permission of said railroad company was injured.

2nd. Because the contract is contrary to public policy because by it the appellee in this case is making an attempt to relieve itself from liability from the gross negligence of its agents and employees.

3rd. Because it is void and unenforcable under the Act of Congress of April 22nd, 1908, Chapter 149, 35 Statutes at Large, page 65, Sections 1 and five thereof.

Which motion the Court overruled for the present.

On cross-examination:

Witness stated that at the time of appellant's employment Appellee was engaged in interstate and intrastate business. That at the time of the signing of the contract Mr. Young, the agent for the St. L. & S. F. R. R. Co., at Aberdeen, Miss., was present. And said Young was the agent at Aberdeen, Miss., also for the Appellee.

Counsel for Appellee here admitted in open Court that at the
67 time of the injury of appellant, that the appellee was engaged in interstate and intrastate business as a common carrier and that appallent was so engaged at the time of his injury. Witness further stated that at all stations on the St. L. & S. F. R. R. Co., between Memphis, Tenn., and Aberdeen, Miss., that the agent for said Railroad Co. was also the agent of the Appellee except at Tupelo and New Albany, Miss. That Mr. Young, the agent for the Appellee in Aberdeen, Miss., at the time of the trial of this cause was taking place.

This was all the testimony offered by Appellee.

At the conclusio[illegible] f this testimony, appellant by his counsel moves the Court to di[illegible]iss the bill of complaint and grant a decree for the defendant and assigned the following causes; to-wit:

1st. Because the contract upon which Appellee's case was based and under which he asked relief was contrary to public policy because by it the St. L. & S. F. R. R. Co., a common carrier attempted to relieve itself from liability from the gross negligence of its agents and employees in the course of its business on account of which gross negligence the Appellant, an express messenger while lawfully on the train of the R. R. Co., and with the permission of the R. R. Co., was injured.

2nd. Because the contract is contrary to public policy because by it the Appellee a common carrier by railroad attempts to release itself from liability of the gross negligence of its business on account of

which gross negligence the appellant, while acting as express messenger for the Appellee and while lawfully on the train of the St. L. & S. F. R. R. Co., the agent of the Appellee, by permission of the R. R. Co., was injured.

3rd. Because the contract upon which bases its right to relief is void and unenforcable because it is contrary to a provision of the Act of Congress of April 22nd, 1908, Chapter 149, 35 Statutes at Large, page 65, Sections 1 and 5 thereof.

68 4th. Because by taking jurisdiction and granting relief under the bill of appellee this court would be acting contrary to the statute made and approved by the Congress of the U. S. and would be an interference of the jurisdiction of the State Court of Miss., previously acquired in the case of Appellant vs. the St. L. & S. F. R. R. Co.

To the Motion the Court then requested the appellant to place any proof he may desire as to the merits of his controversy and reserved his ruling as to the objections to the introduction of the contract and reserved his ruling as to the objections made by appellant, to be taken under advisement and decided in vacation as of this term.

Appellant then Offered the Following Testimony:

O. G. TAYLOR, a witness in behalf of himself, duly sworn, testified as follows:

Witness testified that he did not sign the messenger's contract and had no knowledge of such contract until after he received through the mail a similar paper which he refused to sign but returned to Mr. Calkins, the Supt. of the Appellee. That he had no knowledge of the contract offered in evidence having been presented to him by Mr. Pettigrew. He said he refused to sign the one sent him through the mails because such a contract would be an injustice to himself and his family and that he would have resigned his position before he would have signed such a contract. That after he received the injury for which he sued the St. L. & S. F. R. R. Co., that Mr. Calkins, the Supt. of the Appellee came to see him and told him that he had signed the messenger's agreement; and that he and the said Supt. had a hot dispute over it as to what he was to do. That he told the said Supt. that if he had his signature to the messenger's agreement he sure got it from some other source and not from him and that this caused the dispute.

That at the time of the accident he was handling express packages in and out of the state and other states; that he remembers

69 handling packages from Miss. consigned to Birmingham Ala. That he handled packages consigned to parties in the State and parties out of this State.

On cross-examination:

He stated that Mr. Pettigrew was in Aberdeen but he did not remember the date. Here witness was shown an application for position which he said he signed. He was asked if he signed the

messenger's agreement which was offered in evidence; witness denied that he signed it; denied that it was his signature; denied that he wrote Oscar Greenberry Taylor. That during his employment with Appellee he signed many monthly receipts for his salary and the receipt offered in evidence dated 6/3/1909 appears to be his signature and as a matter of fact was his signature; which was offered in evidence and marked Exhibit "A" to his testimony.

EXHIBIT "A."

Exhibit "A" omitted from printed record, being heretofore copied at page 59, as Exhibit "E."

* * * * * * *

Receipt dated July, 1909 was also signed by him and was offered as Exhibit "B" to his testimony. The exhibit "C" was also signed by him.

EXHIBIT "B."

Exhibit "B" omitted from the printed record, being heretofore printed at page 59 as Exhibit "F."

* * * * * * * *

Witness also said that he signed Exhibits D, E, and F.

EXHIBIT "C."

Exhibit "C" omitted from the printed record, being heretofore copied at Page 60 as Exhibit "G."

* * * * * * *

Witness also said that he signed Exhibits D, E, and F.

76 EXHIBIT "D."

Exhibit "D" omitted from the printed record, being heretofore printed at Page 60 as Exhibit "H."

* * * * * * *

EXHIBIT "E."

Exhibit "E" omitted from the printed Record, being heretofore printed at Page 60 as Exhibit "J."

* * * * * * *

EXHIBIT "F."

Exhibit "F" omitted from printed record, being heretofore printed at Page 61 as Exhibit "K."

* * * * * * *

Witness testified that he signed the answer to the motion for a temporary injunction on May 20th, 1910. He also signed the demurrer dated May 19th, 1910. He also signed the papers of Oct. 3rd, 1910, and the demurrer to the supplemental bill of Oct. 3rd, 1910, and the answer on the 28th day of June, 1910. He then admitted that he signed Exhibit "F." Stated that his full name was Oscar Greenberry Taylor. And he supposed that he signed an application for bond at the time he signed the application for employment.

Redirect examination:

Said he signed many other papers because he had to make daily reports. Said he supposed he was in the employ of appellee for six months.

Recross-examination:

Said he mailed all of his daily reports to Mr. Calkins, the Supt.

This was all of the testimony offered.

71 We, the solicitors for the complainant and the respondent in the suit of Wells Fargo & Co., vs. Oscar G. Taylor agree that the foregoing is a true, complete and properly prepared statement of the evidence introduced on the hearing from the order in which an appeal has been taken.

PAINE & PAINE,
SYKES & SYKES.

The foregoing having been approved by the solicitors of the respective parties is now approved by me and the Clerk is directed to file the same as the statement of the evidence introduced on the hearing referred to.

This the 3rd day of Oct., 1914.

H. C. NILES,
Judge."

The counsel for Appellee here admitted that the Appellee took no appeal or further proceedings in the Circuit Court of Monroe County, Miss., in the case of O. G. Taylor, vs. St. L. & S. F. R. R. Co., after appellee's petition to be made a party defendant in that Court has been denied by said Court.

Respondent then offered in evidence the motion of the Appellee made in the Circuit Court of Appeals on the former appeal of this case, numbered 2716, in which motion the Appellee, after the case had been reversed, requested the Circuit Court of Appeals to permit the bill to be amended or to direct the District Court to permit the amendment to the bill.

Respondent then introduced the order of the Circuit Court of Appeals in the above styled cause overruling said motion of Appellee; which is in words and figures as follows:

72 United States Circuit Court of Appeals, Fifth Circuit.

No. 2716.

OSCAR G. TAYLOR

vs.

WELLS FARGO & COMPANY.

Appeal from the United States District Court, Northern District of Mississippi.

Before Pardee and Walker, Circuit Judges, and Maxey, District Judge.

By the Court: After a full consideration, the petition for rehearing in the above numbered and entitled case is denied.

(Original filed April 5th, 1915.)

(Certificate.)

United States Circuit Court of Appeals for the Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing one page, numbered 1, contains a true copy of the Order Denying Rehearing in the case of Oscar G. Taylor, Appellant, versus, Wells Fargo & Company, Appellees, No. 2716, as the same remains upon the files and records of said United States Circuit Court of Appeals.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at the City of New Orleans, Louisiana, this 8th day of April, A. D. 1915.

[SEAL.] FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

73 The Respondent then offered in evidence the Affidavit of W. T. Ware, Circuit Clerk of Monroe County, Miss., which is in words and figures as follows, to-wit:

Affidavit of W. T. Ware, Circuit Clerk.

STATE OF MISSISSIPPI,
Monroe County:

This day personally appeared before me the undersigned authority, W. T. Ware, who after being duly sworn by me, deposes and says that he is the Circuit Clerk of Monroe County, State of Mississippi. That on or about the 10th day of February, 1910, Oscar G. Taylor

filed a suit in the Circuit Court of Monroe County against the Saint Louis & San Francisco Railroad Company for the sum of Twenty Thousand Dollars ($20,000.00) for personal injuries alleged to have been sustained by him on or about December 8th, 1909, in the wreck of the Aberdeen and Amory Branch train near Aberdeen, Mississippi. That said Taylor was riding on said train under and by virtue of his employment as an express messenger of Wells Fargo & Company. That on or about the 14th day of March, 1910, defendant Railroad Company filed a plea of the general issue and three general pleas. The said special pleas setting out the fact that the said Plaintiff, Oscar G. Taylor, had signed a messenger's agreement when he entered the service of Wells Fargo & Company, that in case of any injury to himself that neither the Railroad Company, nor the Express Company should under any circumstances or in any case be liable for any injury sustained by him. That one of the said special pleas further set up the fact that the defendant Railroad Company and the Express Company had entered into a contract, by which the Express Company agreed to indemnify the Railroad Company for any damage or amount of money it might have to pay to any employee of the Express Company on account of any injury sustained by any said employee.

That the said Wells Fargo & Company, on the 14th day of March, 1910, filed a petition in the Circuit Court of Monroe County,
74 in which it stated that it was the real party in interest by virtue of the messenger's agreement and the contract between it and the Railroad Company (a copy of which agreement and contract are made a part of the petition) and asked that it be made a party defendant to the said suit.

That on or about the same date, the defendant Railroad Company made a motion to require the plaintiff to join the said Express Company as a party defendant. That upon a hearing the Circuit Judge overruled the petition of Wells Fargo & Company and the motion of the defendant Railroad Company and declined to make said Wells Fargo & Company a party defendant to the said suit.

That at the June Term, 1910, of the Circuit Court of Monroe County, this case came on for trial before a jury, and, after the introduction of all the testimony, upon motion of plaintiff, the Circuit Judge excluded all the testimony about the signing of the Messenger's agreement by Oscar G. Taylor and held that the defendant Railroad Company could not legally defend its suit upon the ground of Taylor's having signed the said agreement which released the defendant from any liability in case of injury.

That the said Circuit Judge instructed the jury that under the testimony in the case, the Plaintiff, Taylor, was entitled to recover damages for his injury as shown by the testimony.

That before the case was tried upon its merits, the defendant Railroad Company made a motion for a continuance, which was overruled. The jury returned a verdict in favor of the Plaintiff for Four Thousand Dollars ($4,000.00). The defendant made a motion for a new trial, which was overruled.

The defendant has since filed its petition and bond for an appeal of the case to the Supreme Court of the State of Mississippi. The transcript for the same has not yet been made out by me.

An inspection of the assessment rolls of Monroe County, Mississippi, shows that Oscar G. Taylor is assessed with the following real and personal property, viz: Assessment rolls show nothing.

W. T. WARE,
Clerk of the Circuit Court.

Sworn to and subscribed before me this the 20th day of Sept., A. D. 1910.

C. P. SMITH,
Chy. Clerk,
By S. H. CROSBY,
D. C.

Indorsed: Affidavit of W. T. Ware. Filed Sept. 28, 1910.

This was all the testimony of the Appellant and the Appellant then renewed its motion made at the conclusion of the Appellee's testimony.

The Court here reserved its ruling to be decided in vacation.

We, the solicitors for the Appellant and the Appellee, in the suit of Wells Fargo & Co. vs. Oscar G. Taylor, agree that the foregoing is a true, complete and properly prepared statement of the evidence [evidence] introduced on the hearing from an order in which an appeal has been taken.

PAINE & PAINE,
Solicitors for Appellant.
SYKES & SYKES,
Solicitors for Appellee.

The foregoing having been approved by the solicitors of the respective parties is now approved by me and the Clerk is directed to file the same as the statement of the evidence introduced on the hearing referred to.

This the 19th day of May, 1917.

H. C. NILES,
Judge.

Indorsed: Narrative Statement of Testimoney. Filed May 21, 1917.

76 *Opinion on Motion to Dismiss Bill, etc.*

In the District Court of the United States for the Eastern Division of the Northern District of Mississippi.

In Equity. No. 158.

WELLS FARGO & COMPANY, Complainant,

vs.

O. G. TAYLOR, Defendant.

This cause is before the Court on Motion of defendant to dissolve the injunction and dismiss the bill, upon the grounds mainly that this Court was without jurisdiction to grant the injunction and no equity is shown on the face of the bill.

It will be recalled that, in a former hearing of this cause, this Court granted a temporary injunction restraining the defendant from proceeding to collect a judgment against the St. Louis & San Francisco Railroad Company obtained in the Circuit Court of Monroe County, Mississippi, and afterwards affirmed by the Supreme Court of Mississippi. This temporary injunction was, by this Court, at a later date made perpetual.

The cause was then carried to the Circuit Court of Appeals for the Fifth Circuit, the questions involved, both of law and fact, having been before this Court and thoroughly threshed out, as shown by the opinions and rulings on file with the pleadings in this cause.

The Circuit Court of Appeals reversed and sent the case back for a rehearing, because of certain imperfections of the bill, in that it failed to allege and prove by testimony, that the defendant was not jointly employed by the Express Company and Railroad Company, and, for this reason the Employers' Liability Act of 1908, could not be invoked, and in consequence, no equity showed on its face.

Complainant upon motion was thereafter allowed to amend its original bill reciting the fact that defendant was not a joint employee of the two companies, nor was he at the time of his injury. At the hearing proper proof was made of this fact.

77 Because of the Court's rulings, made upon every one of the questions involved at former hearings of the cause, and since, after careful consideration, no additional reasons are advanced to change the Court's position, it is considered that the bill, as amended, with the proof as offered, is sufficient, and the Complainant entitled to the relief sought.

One interesting question arising in this cause, in the judgment of the Court, has been definitely and conclusively settled very recently by the Supreme Court of the United States in the case of Robinson vs. Baltimore & Ohio Railroad Company, 237 U. S., 84.

This question involving the construction of the Federal Employees' Liability Act, was, as to whether the Railroad Company and the Pullman Company were partners or exercising a partnership

relation or whether their joint business created an agency relationship, and thus creating a liability.

In the case of Robinson vs. Baltimore & Ohio Railroad Company, just cited, it is laid down

"In a suit for personal injuries under the Employers' Liability Act, a contract between the plaintiff and a third party may be admissible in evidence on the trial to show that Plaintiff was not defendant's employee even though a demurrer had been sustained to a special plea that the contract contained a release of liability.

"A contract between the Pullman Company, as employer, and its employe releasing the employer, and also all railroad corporations over whose lines the employer's cars were operated, from all claim of liability in personal injury sustained by the employee, held in this case valid unless the employe of the Pullman Company was also the employe of the Railroad Company, in which case that provision of the contract would be invalid under Section 5 of the Employers' Liability Act.

"Congress in legislating on the subject of carriers by rail was familiar with the situation and used the term employe in its natural sense and did not intend to include as employes of the carrier
78 persons on interstate train engaged in various services for other masters."

The law as thus announced is regarded as controlling in the instant case, and compelling as to Complainant's equity as prayed in its bill.

Let a decree enter in accordance with the foregoing.

H. C. NILES,
Judge.

Indorsed: Opinion of the Court on Defendant's Motion to Dismiss the Bill, etc. Filed March 7, 1917.

Final Decree.

In the District Court of the United States for the Eastern Division of the Northern District of Mississippi.

In Equity. No. 158.

WELLS FARGO & COMPANY

vs.

OSCAR G. TAYLOR.

This cause came on to be heard in open court at the regular October Term of said court, A. D. 1916, and was argued by counsel and was taken under consideration by the Court to be decided in vacation; and thereupon, upon consideration thereof in vacation, and it appearing to the Court that all the allegations of the Original Bill, and the amendments thereto, and the supplemental bill, are true

as therein stated, and that the institution and prosecution of the suit in the State Courts of Mississippi by the defendant, Oscar G. Taylor, against the St. Louis & San Francisco Railroad Company, was in direct violation of the Messenger's agreement, a contract entered into between the said Taylor and the Complainant, Wells Fargo & Co., and was a fraud practiced by the said Taylor upon the complainant; it is therefore ordered, adjudged and decreed as follows, viz:

79 That said motion of the defendant to exclude the testimony introduced by the complainant, be and the same is hereby overruled;

That the defendant, the said Oscar G. Taylor, be required, and he is hereby ordered to carry out and perform the terms and conditions of said "Messenger's Agreement" as follows, viz:

That the said defendant, Oscar G. Taylor, within thirty days after the signing of this decree, shall execute and deliver to the complainant a contract or agreement or release whereby the said defendant, Taylor, releases the said complainant and the Saint Louis & San Francisco Railroad Company from all damages of every character whatsoever for personal injuries sustained by the said Oscar G. Taylor, on or about the 8th day of December, 1909, caused by the derailment of a car of the Saint Louis and San Francisco Railroad Company, in which the said Oscar G. Taylor was riding at said time.

It is further ordered, adjudged and decreed that a perpetual injunction be issued in this suit against the said defendant, his heirs, assigns and all claiming under or through him, restraining and enjoining him or them from collecting or in any matter attempting to collect the judgment against the Saint Louis and San Francisco Railroad Company, and its surety, the United States Fidelity and Guaranty Company, obtained by the said defendant, Oscar G. Taylor, in a suit brought by the said defendant, Oscar G. Taylor, against the said Saint Louis & San Francisco Railroad Company, for damages for said personal injuries caused by the derailment of said car on December 8, 1909, as above set forth, in the State Circuit Court of Monroe County, Mississippi, in which suit judgment was rendered for the defendant, Oscar G. Taylor, for the sum of Four Thousand Dollars ($4,000.00), from which judgment the Railroad Company appealed the case to the Mississippi Supreme Court where the said judgment was affirmed.

80 It is further ordered, adjudged and decreed that the defendant, Oscar G. Taylor, be taxed with all costs of this suit.

It further appearing that the said Oscar G. Taylor has filed his petition for appeal, and filed his bond for appeal, and that the same have been granted, it is further ordered that the terms of this decree be held in abeyance until this cause is finally determined on appeal.

Ordered, adjudged and decreed this the 26th day of April, 1917.

H. C. NILES,
Judge.

Indorsed: Final decree,—perpetuating injunction, and requiring specific performanse, and taxing defendant with all costs. Filed April 26, 1917.

Agreement of Counsel as to Præcipe, etc.

In the District Court of the United States for the Eastern Division of the Northern District of the State of Miss.

In Equity. No. 158.

WELLS FARGO & COMPANY

vs.

O. G. TAYLOR.

We, the undersigned attorneys, representing the Appellee, the Wells Fargo & Co., acknowledge to have received a copy of the Præcipe filed in this cause by the attorneys for the Appellant and we hereby approve the same and agree that it contains all necessary papers; and we agree that a copy of the stenographers' notes may be embodied as part of this record and ask the Clerk to prepare the record in accordance with the præcipe of Appellant. We hereby waive the necessity of submitting the same to the Judge of this Court and any other formality in connection with said præcipe.

81 Witness our signatures, this 17th day of May, 1917.

SYKES & SYKES,
By J. A. S.,
Attorneys for Appellee.

Indorsed: Agreement of cousel for appellee as to receipt of copy of præcipe and to its correctness, etc. Filed May 21, 1917.

In the District Court of the United States for the Eastern Division of the Northern District of Mississippi.

In Equity. No. 158.

WELLS FARGO & COMPANY

vs.

OSCAR G. TAYLOR.

Now comes the said Wells Fargo & Company, Appellee, and waives the issuance and service on it of the Citation on the appeal by O. G. Taylor in the above styled cause. This waiver to be and have the same effect as if citation such as is required by law had been duly issued and served on Complainant this date.

Witness our signatures this the 12th day of May, 1917, Aberdeen, Miss.

SYKES & SYKES,
By E. O. SYKES,
Solicitors for Complainant.

Indorsed: Waiver of issuance and service of Citation of Appeal by Appellee's Counsel. Filed May 17, 1917.

82 In the United States District Court for the Eastern Division of the Northern District of Mississippi.

In Equity.

O. G. TAYLOR, Appellant,

vs.

WELLS FARGO & Co., Appellee.

To the Clerk of said court:

You are requested to make a transcript of the record in the above styled cause to be filed in the United States Circuit Court of Appeals for the 5th Circuit at New Orleans, La., pursuant to an appeal granted in the above styled cause on the 26th of April, 1917, and to include in such transcript of record the following copies of certain papers, etc., and no other papers:

1st. Organization of the Court and action of the Court at the October Term, 1916, in taking the cause under advisement to be decided in vacation.

2nd. The Assignment of Errors.

3rd. The Order allowing Appeal, Petition for the Appeal and the Bond.

4th. The original and supplemental bills and exhibits thereto

5th. Petition for Temporary Injunction.

6th. Order granting Temporary Injunction.

7th. Temporary Injunction.

8th. Answer of Respondent to the Original and Supplemental bills, filed June 28th, 1913.

9th. Motion of the Respondent, after the reversal of this cause by the Circuit Court of Appeals, to dismiss the bills, dissolve the injunction and tax Complainant with the costs, filed on May 24th 1915.

83 10th. Motion of Complainant to amend the bills, filed June 26th, 1915.

11th. Decree overruling motion to dismiss the bills, etc.

12th. Decree allowing Complainant to amend bills.

13th. Amendments to Original Bill, filed Sept. 27, 1916.

14th. Answer of Respondent to amended bill, filed Sept. 27th 1916.

14½. Agreement of Counsel as to introduction of certain papers

15th. Narrative statement of testimony introduced and exhibits

16th. Opinion of the Court on Motion of Appellant made at the trial of the cause to dismiss the bill and dissolve the injunction, etc.

17th. Final Decree.

18th. Agreement of counsel for Appellee that the Præcipe is correct and waiver of service of copy of the same.
19th. Waiver of citation of Appeal.
20th. Præcipe of Transcript.
21st. Certificate of Clerk.
You will file said Transcript with the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, La.
This the 26th day of April, 1917.

PAINE & PAINE,
Counsel for Appellant.

Indorsed: Præcipe to Clerk. Filed May 21, 1917.

84 UNITED STATES OF AMERICA,
Northern District of Mississippi,
Eastern Division:

In Equity. No. 158.

WELLS FARGO & COMPANY

vs.

OSCAR G. TAYLOR

I, Lemuel E. Oldham, Clerk of the District Court of the United States within and for the Eastern Division of the Northern District of Mississippi, do hereby certify that the foregoing typewritten pages, numbered from one (1) to ninety-seven (97), both inclusive, is a full, true, complete and correct transcript of the record and proceedings in the above entitled cause, except such papers as are omitted by direction of Counsel, as the same remains of record and on file in my office at Aberdeen, Mississippi.

In Testimony Whereof, I hereunto affix my signature and the official seal of said United States District Court at Aberdeen, in said Division and District, on this the 12th day of June, A. D. 1917.

LEMUEL E. OLDHAM,
Clerk as Aforesaid.
By R. D. CRENSHAW,
Deputy Clerk.

85 That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and Submission.

Extract from the Minutes of December 17th, 1917.

No. 3102.

OSCAR G. TAYLOR

versus

WELLS FARGO & COMPANY.

On this day this cause was called, and, after argument by Thomas Fite Paine, Esq., for appellant, and E. O. Sykes, Esq., for appellee, was submitted to the Court.

86 *Opinion of the Court.*

Filed February 28th, 1918.

In the United States Circuit Court of Appeals, Fifth Circuit.

No. 3102.

OSCAR G. TAYLOR, Appellant,

vs.

WELLS FARGO & COMPANY, Appellee.

Appeal from the District Court of the United States for the Northern District of Mississippi.

Thomas Fite Paine (Paine & Paine on brief) for Appellant.
E. O. Sykes (E. O. & J. A. Sykes and Branch P. Kerfoot, on brief) for Appellee.

Before Walker and Batts, Circuit Judges, and Evans, District Judge.

BATTS, *Circuit Judge:*

A contract between the St. Louis & San Francisco Railroad Company and Wells Fargo & Company, providing for the operations of the Express Company over the lines of the Railroad Company, contained a provision to this effect: The Express Company agrees "that it will and does hereby assume all risks and damage to its agents and employees while engaged in its business on any of the railways or property of the Railroad Company, and hereby agrees to indemnify and hold harmless the St. Louis & San Francisco Railroad
87 Company on account for all claims for damages suffered by the agents and employees of the Express Company, while en-

gaged in its business on any of the railways or property of the Railroad Company." An instrument introduced in evidence, marked "Messenger's Agreement", and reciting that it was an agreement between Wells Fargo & Company and Taylor, the plaintiff in error, but signed alone by the latter contains a provision to the effect "that neither the party of the first part (Wells Fargo & Company) nor any railroad or steamboat company, or other carrier, on whose lines said party of the second part may travel as such messenger or guard, shall, under any circumstances, or in any case whatever, be liable for any injury occuring to said party of the second part, while so traveling, whether such injury arises from any fault, carelessness or negligence, gross or otherwise, on the part of said railroad or steamboat company, or other carrier, its agents or servants; it being the intent of this contract that said party of the second part shall and will assume all and every risk incident to said employment, from whatever cause arising."

Taylor, having been injured while discharging his duties as an express messenger, in an accident on the St. Louis & San Francisco Railroad, instituted suit against the Railroad Company in a state court of Mississippi. The Express Company filed a petition in that court, setting out the contracts, and asked to be made a party defendant, in order that it might remove the case to the Federal Court. The prayer of the petition was refused. It thereupon instituted a
88 suit against appellant in the District Court of the United States, setting up the facts with reference to the agreements, and other facts; and, in addition to the prayer for general relief, asked for a temporary injunction, which was refused. The case in the state court proceeded to trial, resulting in a judgment for $4,000.00 for the plaintiff, which was affirmed by the Supreme Court of that State. Upon trial of the suit instituted by the Express Company a judgment was rendered for the Company. An appeal to this Court resulted in a reversal, the judgment being based upon the insufficiency of the pleadings, (220 Fed. 796). The bill was amended, and, upon a new trial, judgment was again for the Express Company, and the collection of the judgment rendered in the state court was enjoined. From that judgment this appeal is taken.

Appellant contends that the former judgment in this Court was final, and that this Court, not having permitted an amendment, the bill could not be amended below; that the suit was in violation of section 720 of the Judicial Code; that the contracts between the Express Company and the express messenger, and between the Express Company and the Railroad Company, whereby the Railroad Company was to be relieved from the effect of negligence, were void; and that, by virtue of section 5 of the second Employers' Liability Act (35 Stat. 65, c. 149, and the amendment of April 5th, 1910,—36 Stat. 291, c. 143) the contract between the Express Company and the appellant is void. If the last mentioned contention of appellant is meritorious it will not be necessary to consider the other questions.

The Employers' Liability Act provides: "Every common carrier

by railroad, while engaged in commerce between any of the
89 several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * *." Section 5 provides: "That any contract, rule, regulation or device whatsoever, the purpose or intent of which be to enable any common corrier to exempt itself from any liability created by this Act, shall, to that extent, be void."

If the terms of the Act apply to express companies, the contract between Wells Fargo & Company and the messenger is void. Second Employers' Liability Cases, 223 U. S., 1; Phila. Balt. & Wash. R. R. vs. Schubert, 224 U. S., 603.

An express company is a common carrier. Bank of Kentucky vs. Adams Express Co., 93 U. S. p. 174. An express company is a common carrier by railroad. If this fact were not universally known, it would be sufficiently indicated by the contract between the appellee and the St. Louis & San Francisco Railroad Co. It is not seen how an insistence to the contrary can be made. Indeed, there is no contention that the Express Company is not a common carrier by railroad; but the proposition is that, notwithstanding the language, the Act does not apply to express companies. The argument seems to be based upon rulings to the effect that the original Interstate Commerce Act was not applicable to express companies, and upon the case of Robinson vs. B. & O. R. R. Co., 237 U. S., 84, which holds that an employee of the Pullman Company is not an employee of the railroad company.

The Interstate Commerce Commission, in the Matter of the Express Companies, 1 Interstate Com. Reps., p. 347, held that the original Interstate Commerce Act was not intended to apply to
90 express companies. The language of that Act was to the effect: "That the provisions of this Act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water". In reaching a conclusion that the express companies were not included an unconvincing argument was based upon the use of the word "wholly". The Commission says: "The use of that word in the section which was evidently framed with the greatest care, affords a fair foundation for the claim that the Act does not describe the modes of transportation employed by express companies with sufficient precision to bring them within its terms". The proposition which seems to have been most meritorious in reaching the conclusion was "that the details of the law in its various provisions are so framed as to apply distinctly to railroads and railroad companies, and that they do not apply to the carriage of property by express companies without various implications and eliminations which give a somewhat strained construction to the language used." A number of examples are then given in support of this proposition. The Commission finally suggests "in case of doubtful jurisdiction, it is far better that the legislative body should resolve the doubt". This holding of the Interstate Commerce Commission was not more than acquiesced in by the courts (Am. Ex. Co vs. U. S., 212 U. S., 522). It is to be observed that the language of the Act which was under construction is

very different from that employed in the Employers' Liability Act. Even if the processes of reasoning were entitled to greater respect, the decision would not be held applicable to the present case.

91 Robinson vs. Baltimore & Ohio R. R. Co. is cited by appellee as decisive of the proposition that the Employers' Liability Act does not apply to an express company and its employees. That was a suit instituted by a Pullman porter, injured while performing his duties, against the railroad company. The Supreme Court says: "The inquiry is whether the plaintiff comes within the statutory description, that is, whether, upon the facts disclosed in the record, it can be said that, within the sense of the Act, the plaintiff was an employee of the railroad company, or whether he is not to be regarded as outside that description, being in truth on the train simply in the character of the servant of another master, by whom he was hired, directed and paid, and whose will he was to be continued in service or discharged." The Court continues: "We are of the opinion that Congress used the words 'employee' and 'employed' in the statute in their natural sense, and intended to describe the conventional relation of employer and employee"; and concludes: "We conclude that the plaintiff in error was not an employee of the defendant company within the meaning of the Employers' Liability Act, and that the judgment must be affirmed." A ruling that a porter, hired by the Pullman Company, is not a railroad company employee, is not conclusive that a messenger, hired by an express company, is not an express company employee.

It would not be difficult to make a fairly satisfactory argument to the effect that an express messenger is an employee both of the express company and of the railroad company. In the case of B. & O. R. R. Co. vs. Voight, 176 U. S. 498 (decided before the passage of the Employers' Liability Acts) recovery was refused an em-

92 ployee of the express company, in a suit against the railroad company, the Court in argument suggesting that the relation between the Express Company and the express messenger more nearly resembled that of an employee than a passenger, since "his position is one created by an agreement between the express company and the railroad company, adjusting the terms of a joint business", and that the express messenger could not recover for the negligence of a fellow servant.

The relations between an express company and a railroad company have the elements of a partnership, of agency, of a common enterprise. Oliver vs. Northern Pacs. R. R. Co., 196 Fed., 432. It is not necessary, however, to determine whether appellant could have recovery against the Railroad Company under the Act or otherwise.

The issue necessary to be determined is whether the 5th section of the Employers' Liability Act renders void so much of the contract between the messenger and the express company as undertakes to negative the right of the messenger to recover for injuries. This answer is dependent upon whether the Act applies to express companies. The language of the Act does not see to leave any ground for construction or interpretation. It is perfectly

clear and absolutely unequivocal. The terms of the Act apply to every common carrier by railroad. The circumstances that the common carrier may also conduct a business other than by railroad cannot destroy the fact that it conducts a common carrier's business by railroad. If the fact that an express company may also be a common carrier by water, or by stage, could destroy the applica-
93 bility of the Act, railroad companies that utilize water transportation would also be exempt.

The transportation which is conducted on a railroad by an express company is properly within the function of the railroad. All of the handling of freight by express companies could be by railroad companies, and shippers could compel the acceptance by railroad companies of such freight. The arrangement between railroad companies and express companies by which they co-operate in handling part of the freight which railroad companies are compelled to carry, is regarded as legal. There would be nothing to prevent a railroad company from making somewhat similar arrangements with express companies or freight lines, by which the balance of its freight might be handled by intermediary transportation companies. It could, doubtless, in the same way farm out its passenger transportation business. The exercise, with regard to the balance of its business, of the rights which it has exercised with reference to that portion of it which has gone to the express companies, would dispense with a very large per cent of all of the direct employees of the railroad company. The arrangement would, in very large measure, nullify the Employers' Liability Act, if it is limited in its application as contended by appellee.

It was the purpose of the Congress to provide special protection to persons subject to the hazards incident to the operation of railroads. There could have been no reason for giving the protection to a railroad conductor, and refusing it to an express messenger. It will not be assumed that Congress intended to make a distinc-
94 tion in the absence of language that would so indicate. It will certainly not be assumed in the face of language which is clear and unambiguous.

Those of the decisions which seem to sustain the right of a railroad company and an express company, between them, to contract away the right of a human being to protection against negligence are entirely out of harmony with fundamental principles of right and the ordinary conceptions of law. No court ought at this time, in the face of the unequivocal language of the Congress, to make a ruling which would differentiate express company messengers, not alone from other persons engaged in the hazards of railroading, but from all other persons engaged in hazardous businesses. The Employers' Liability Act is proof that Congress was not unresponsive to the universal feeling that every business should carry its hazards. It will not be assumed that language, which is properly and logically comprehensive, is to be so construed as to exclude a class dependent on legislation even for protection against negligence.

Appellant is not seeking relief under the terms of the Employers'

Liability Act, but he is insisting that that part of the contract which the Express Company claims deprived him of all protection, is void. We so hold.

The judgment of the lower court is reversed and the cause remanded with directions to dismiss.

Reversed.

(Original Filed February 28th, 1918.)

95 *Judgment.*

Extract from the Minutes of February 28th, 1918.

No. 3102.

OSCAR G. TAYLOR

versus

WELLS FARGO & COMPANY.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Mississippi, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause, be, and the same is hereby reversed; and that this cause be, and it is hereby remanded to the said District Court with directions to dismiss;

It further ordered, adjudged and decreed that the appellee, Wells Fargo & Company, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

96 *Petition for Rehearing.*

Filed March 19th, 1918.

United States Circuit Court of Appeals, Fifth Circuit.

No. 3102.

OSCAR G. TAYLOR, Appellant,

versus

WELLS, FARGO & COMPANY, Appellee.

Petition for Rehearing by Appellee, Wells, Fargo & Company.

Appeal from the District Court of the United States for the Northern District of Mississippi.

The appellee, Wells, Fargo & Company, in the above entitled cause, petitions the Court for a rehearing after judgment in said cause;

Or, should this honorable Court deny this petition, then appellee would respectfully petition that this Court certify the cause to the United States Supreme Court, because of the importance of this decision in construing the Employer's Liability Act; and, because there is a direct conflict in the decision of this Court and at least that of one State Court, viz.: that of New Jersey, in the case of Higgins v. Erie Railroad Company, 99 Atl., 98.

We ask for a rehearing for the following reasons:

97 First.

Conceding the correctness of the opinion for the purpose of this ground, viz.: that appellee is a Common Carrier by Railroad, under the Employers' Liability Act, yet appellee cannot be held liable in this case, for the reason that the liability appellee seeks to avoid is not created by this Act.

Section 5 of the Act provides: "That any contract * * * the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void."

The record in the case shows that the liability in question here is the liability only of the Railroad Company. No suit was ever filed against the Express Company arising from the injury. The case of Robinson v. Railway Company, 237 U. S. 84, we submit, is express authority for the statement that the Railroad Company could not be held liable in this case in the Federal Courts. The same case is also express authority for the statement that the appellant here was not an employee of the Railroad Company; and, further, that, under the contracts here in question, this is not a

case of co-proprietorship, as in the Oliver Case. The Voight Case is express authority for the statement that appellant here was not a passenger. In the Voight Case, by dictum it was intimated that the relationship more nearly resembled that of employer and employee; but the Robinson Case expressly holds, after referring to the Voight Case, that this relationship is not one of employer and employee. Next-to-the-last paragraph of the able opinion of this learned Court states the following:

"Appellant is not seeking relief under the terms of the Employers' Liability Act, but he is insisting that that part of the contract which the Express Company claims deprives him of protection, is void. We so hold."

98 The record in the case shows that appellant did not attempt to hold the Railroad Company liable under the Federal Employers' Liability Act.

In appellant's brief on the first appeal of this case, No. 2716, on page 6 of same, we find the following statement: "Appellant recognizes the fact that, to reverse this case, he must prove three things:" The third one is as follows: "That appellant was injured by appellee or its officers, its agents or employees, as set out in section 1 of the Employers' Liability Act of 1908."

It is manifest that appellant was not injured by any negligence on the part of the appellee, or an employee or agent of appellee, in the conventional use of the words, "agent" and "employee." The Employers' Liability Act uses the words, "officers, agents, or employees of such carrier." It is to be borne in mind, as stated in the opinion in the Robinson Case: "Congress used the words 'employee' and 'employed' in the statute in their natural sense, and intended to describe the conventional relation of employer and employee." Applying this same language to the other words of the Act, viz., "officers and agents," it is evident that Congress used the words "officers and agents" in their natural sense, and intended to describe the conventional relation of employers and employees to these agents and officers of the employed. The Bank of Kentucky Case, 93 U. S. 174, after deciding that an Express Company was a common carrier of packages intrusted to it, and stood in that relation to the consignor and consignee, and having the relationship of a common carrier in view, held, that so far as the shipper or consignee was concerned, the railroad company over whose line the messenger was traveling with the express matter, was the agent or employee of the Express Company. The distinction between that case and the instant case is, that neither the express company nor the railroad company was a common carrier of appellant. The express company was no carrier of him at all. The railroad company carried him by virtue of its contract with the express

99 company and the express company's contract with Taylor. Taylor being expressly informed in his contract of the other contract. It has been expressly decided that railroad companies are not common carriers of express carriers. Express Cases, 117 U. S. 1.

Since they are not common carriers of express carriers, then

certainly they are not common carriers of express messengers. This is, of course, with reference to the express company and the express messenger, but not to third parties or to strangers to these contracts, as was the Bank of Kentucky Case.

We, therefore, submit, that under the terms of this Act, the Railroad Company, whose negligence is complained of, was neither an officer, agent, or employee of the express company, so far as appellant is concerned, and, therefore, that the liability in question here, whether it be treated as the liability of the Railroad Company or as the liability of the Express Company, was not created by this Act.

So far as appellant, appellee, or the Railroad Company are here concerned, the Railroad Company was an independent contractor for the carriage of the express matter and express messenger.

"Stated as a general proposition, if the contractor is under the control of the employer, he is a servant; if not under such control, he is an independent contractor."—14 R. C. L., p. 67.

The above, we submit, is the general rule and clearly states the distinction between an independent contractor and an employee, agent, or servant.

I am the employer of a plantation manager. I purchase for him a ticket over the Mobile & Ohio Railroad Company, from Aberdeen, Mississippi, to St. Louis. I give him this ticket and send him to St. Louis to purchase mules for me. In transit, because of the negligence of the railroad company, the train is derailed and my employee injured. Certainly I am not responsible for the negligence of the railroad company. In legal aspects that case is similar to this on the question of agency and employee. The railroad company was neither my agent nor my employee, in the sense of making me liable for its negligence. The Robinson Case says that these terms are used in their natural sense. We, therefore, submit, that for a complete discussion of this question, this petition for rehearing should be granted.

100

Second.

Because of the importance of the question involved, and because of the fact that there were so many other questions involved in this appeal, on the oral argument it was impossible, within the time allowed, to discuss fully the question of whether or not an express company is a common carrier by railroad, within the terms of this Act. Under the rules of the Court, we are not permitted to go very fully into the question. We make the following brief suggestions, however:

Section 1 speaks of defects in cars, engines, appliances, machinery, track or railroad bed, etc., showing that the Act was directed at railroad companies. The debates in Congress over this Second Employers' Liability Bill show that the senators and members of Congress thought that it only applied to railroad companies. See remarks of Senator Dolliver, 5th Cong. Record. 1st Session, 60th Congress, p. 4527. See, also, Report of the Committee, extensively

quoted from in our brief on the first appeal. A thorough examination of the Mondou Case (Second Employers' Liability Cases, 223 U. S. 1), we submit, clearly indicates that the Supreme Court meant to confine it to railroad companies.

The express business is commonly recognized and understood to be one of the most important of an interstate nature. We submit that whenever Congress has desired to legislate about express companies, it has always used the specific term, "express companies;" that whenever it has desired to legislate about railroad com-
101 panies, it has generally used the term, "common carrier by railroad," or some like character. The interpretation put on the Interstate Commerce Act by the Commerce Court, and later followed by the United States Supreme Court in 212 U. S., was understood and practically read into the subsequent legislation of Congress; and whenever Congress wanted to include Express Companies, Pullman-Car Companies, or Telegraph Companies, within the terms of an Act, it has done so by using the above specific terms. The term, "common carrier by railroad," does not describe an express company. The decision of the Commerce Court, above referred to, has been followed in all the State and Federal Cases that have come under our observation, with probably one exception. We, therefore, respectfully submit that, on account of the great importance of this question, the Court should grant this petition for a re-argument, allowing us to discuss simply the questions here raised. There are many decisions of inferior Federal Courts and the courts of last resort of states, to which we would like to call the attention of the Court on a rehearing.

We would further ask the Court, if it should overrule this Petition for a Rehearing, then, that it certify the questions here discussed to the United States Supreme Court for the following reasons: First, because the Court is construing a very important Act of Congress, and it is of general importance to the express companies and their employees to know whether or not an express company is a common carrier by railroad, under the provisions of this Act. Second, because there is a direct conflict in the construction of this Act by this honorable Court and that of the State Court of New Jersey, and, perhaps, other State Courts, probably
102 Illinois for one. We would refer the Court to the dissenting opinion of Mr Justice Pardee in the decision of this case on the first appeal, No. 2716, as also showing reasons why the case should be certified to the Supreme Court.

Respectfully submitted,

WELLS, FARGO & COMPANY,
By E. O. SYKES,
Its Solicitor of Record.

MR. BRANCH P. KERFOOT,
Of Counsel.

I hereby certify that, as solicitor for appellee, the petition for a rehearing, above set out, is meritorious, and, in my opinion, the grounds of said petition are true in point of fact, as well as in

law, and require a rehearing of the case, and that there should be an affirmance of the decree of the Court below in said cause.

Respectfully submitted,

E. O. SYKES,
Solicitor for Appellee.

103 *Order Denying Rehearing.*

Extract from the Minutes of April 15, 1918.

No. 3102.

OSCAR G. TAYLOR,

versus

WELLS FARGO & COMPANY.

Ordered that the petition for rehearing, filed in this cause, be, and the same is hereby, denied.

Clerk's Certificate.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, de hereby certify that the pages numbered from 85 to 103 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and
104 proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 3102, wherein Oscar G. Taylor is appellant, and Wells Fargo & Company are appellees, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 84 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 30th day of April, A. D. 1918.

[Seal of the United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals.

105 In the United States Circuit Court of Appeals, for the Fifth Circuit.

No. 3102.

OSCAR G. TAYLOR, Appellant,

versus

WELLS FARGO & COMPANY, Appellee.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the transcript of the record of the proceedings of this Court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this Court.

In pursuance of the command of the annexed writ of Certiorari, I now hereby certify, that on the tenth day of July, A. D. 1918, there was filed in my office a stipulation in the above entitled case in the following words, to-wit:—

"United States Circuit Court of Appeals, Fifth Circuit.

OSCAR G. TAYLOR, Appellant,

vs.

WELLS FARGO & COMPANY, Appellee.

Stipulation.

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, that the certified transcript of the record in the above entitled case, heretofore filed with the Clerk of the Supreme Court of the United States, be taken as a return to the writ of certiorari issued herein by the Supreme Court of the United States under date of June Sixteenth, One Thousand nine hundred and eighteen.

Dated June —, 1918.

(Signed) PAINE & PAINE,
Attorneys for Appellee."

(Signed) CHAS. W. STOCKTON,
BRANCH P. KERFOOT,
E. O. SYKES,
Attorneys for Appellee."

I further certify that the above is a true and correct copy of said stipulation, and of the whole thereof.

In testimony whereof, I hereunto subscribe my name and affix

the seal of said United States Circuit Court of Appeals, at the City of New Orleans, Louisiana, this 15th day of July, A. D. 1918.

[Seal of the United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals.

106 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America, to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Oscar G. Taylor is appellant, and Wells Fargo & Company is appellee, No. 3102, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Northern District of Mississippi, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United
107 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the sixteenth day of June, in the year of our Lord one thousand nine hundred and eighteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

108 [Endorsed:] File No. 26,509. Supreme Court of the United States, No. 1042, October Term, 1917. Wells Fargo & Company vs. Oscar G. Taylor. Writ of Certiorari. Filed 1st day of July, 1918. Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals.

109 [Endorsed:] 448—26509. No. 3102. United States Circuit Court of Appeals for the Fifth Circuit. Oscar G. Taylor, Appellant, vs. Wells Fargo & Company, Appellee. Writ of Certiorari, and return thereto.

110 [Endorsed:] File No. 26509. Supreme Court U. S. October Term, 1918. Term No. 448. Wells Fargo & Co., petitioner, vs. Oscar G. Taylor. Writ of certiorari, and return. Filed July 18, 1918.

No. 10[redacted]

Supreme Court of the United States.

WELLS FARGO & COMPANY,

Petitioner,

against

OSCAR G. TAYLOR,

Respondent.

PETITION, NOTICE OF MOTION AND BRIEF FOR WRIT OF CERTIORARI.

BRANCH P. KERFOOT,
Attorney for Petitioner.

B. O. SYKES,
J. A. SYKES,
CHAS. W. STOCKTON,
Of Counsel.

[redacted] Evening Post Job Printing Office, Inc., 156 Fulton St., N. Y.

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United States Supreme Court.

In the Matter of the Petition of
WELLS FARGO & COMPANY,
Petitioner,

AGAINST

OSCAR G. TAYLOR,
Respondent.

For a Writ of Certiorari, directed to the Circuit Court of Appeals, for the Fifth Circuit, to bring before the Supreme Court the case of OSCAR G. TAYLOR, Appellant, ads. WELLS FARGO & COMPANY, Appellee.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner respectfully shows as follows:

I. That Petitioner at all times mentioned in the complaint herein was and still is a corporation, organized by a law of Colorado and thereby authorized to do a general express business in the

United States of America, and as an incident to said business, authorized to make contracts with railroads and other common carriers to carry its express and its employes, who have custody of said express matter, and to make contracts with persons who accompany and care for said express on common carriers (R. 9).

II. That on February 10th, 1906, petitioner made a contract with the St. Louis and San Francisco Railroad Company for the carrying of its express and express messengers on the passenger trains of said railroad. Under this contract, respondent was given the sole privilege of having its express and messengers so carried, to the exclusion of all other express companies. For this privilege respondent agreed to pay the said railroad company fifty-five per cent. of its gross earnings, and further agreed to "assume all risk and damage to its agents and employes while engaged in its business on any of the railways or property of the railroad company; and hereby agrees to indemnify and hold harmless the St. Louis and San Francisco Railroad Company, on account of all claims for damage suffered by the agents and employes of the express company while engaged in its business on any of the Railways or property of the railroad company" (R. 9, and Exhibit "A" of Bill, R. 20).

III. That on said date and thereafter to and including December 8th, 1909, the said St. Louis and San Francisco Railroad Company owned and operated a branch line from Aberdeen to Amory, both towns in Mississippi, and transported the express shipments of the petitioner over this line, by virtue of the above mentioned contract.

IV. That on the 20th day of April, 1909, Respondent entered into a written contract or agreement with Petitioner (called Messenger's Agreement and set forth as Exhibit B to the Bill herein) by which Respondent became the express messenger who accompanied and had charge of the express of the petitioner on the passenger trains between the towns of Aberdeen and Amory, Mississippi (R. 23, 58, 65).

This agreement recites that the petitioner neither owns, controls, manages nor in any way directs or operates any railroad, steamboat or other company, but relies upon railroads and other methods of transportation managed by other corporations for the transportation of its packages, and that it is necessary for Petitioner to have guards and messengers accompany this express on the cars and that the railroad and other companies will not allow these employes of Petitioner to accompany this matter (R. 23) "except upon the agreement that said party of the first part [Petitioner] will hold them harmless for any or all

liability for injuries which such employes of the party of the first part may receive while accompanying said goods, etc.; and whereas the party of the second part, with full knowledge of all the foregoing facts, is desirous of entering the employment of the party of the first part as one of such messengers or guards as aforesaid, and whereas the party of the first part declines to employ the party of the second part, except upon the conditions that this agreement shall be duly executed and delivered by the party of the second part" (R. 24).

> "Now in consideration . . . it is agreed that neither party of the first part nor any railroad company . . . on whose lines party of the second part may travel as such messenger or guard, shall, under any circumstances, or in any case whatever, be liable for any injury occurring to said party of the second part, while so traveling, whether such injury arises from any fault, carelessness or negligence, gross or otherwise, on the part of said railroad . . ., itself or their agents or servants; it being the intent of this contract that said party of the second part shall and will assume all and every risk incident to said employment from whatever cause arising" (R. 24, 25).

And it was further agreed that said contract should extend to and inure to the benefit of the railroad company (R. 25).

V. That on December 8th, 1909, while Respondent was riding on the cars of the said railroad company, in charge of the interstate express shipments of Petitioner (R. 66), said cars were derailed, and the express car in which said Taylor was riding by virtue of the above mentioned contract, was thrown to the ground and Respondent sustained certain personal injuries to his body.

VI. That on or about February 10th, 1910, Respondent filed suit in the State Circuit Court of Monroe County, Mississippi, against the St. Louis and San Francisco Railroad Company, for the sum of $20,000.00 damages for personal injuries sustained as above set forth. Petitioner was not made a party to said suit (R. 73).

VII. That on or about March 14th, 1910, this Petitioner filed a petition in said State Circuit Court of Monroe County, Mississippi, setting out its contracts with appellant and the railroad company, and stated that it was the real party in interest and asked that it be made a party defendant, so that it could remove the case to the Federal Court. The defendant railroad company at the same time filed a motion in said cause, asking that the plaintiff be required to make this petitioner a party defendant (R. 12, 73, 74).

The petitioner's and the railroad company's said motions were overruled, and this petitioner

was not allowed to become a party to the suit in the State Court (R. 12).

VIII. That on May 2nd, 1910, this petitioner filed an original bill in equity, in the Federal District Court for the Northern District of Mississippi, which court had jurisdiction, because of the diversity of citizenship of the plaintiff and of the defendant, and in said bill set up the above facts, making the said contract with the railroad company "Exhibit A" to its bill and the contract or agreement with said Taylor "Exhibit B" to its bill. Said bill further alleged the insolvency of said Taylor and that irreparable injury would result to this Petitioner if he were allowed to proceed with his suit in the State Court (R. 9–25).

In addition to the prayer for general relief, said bill prayed that a restraining order or temporary injunction be issued, restraining said Taylor from prosecuting his suit in the State Court until this one had been heard on its merits, and that on final hearing, said Taylor be required to execute and deliver to the railroad company a valid release of his claim for damages for personal injuries, and that said injunction be made perpetual. The restraining order so prayed for was denied.

IX. That on July 12th, 1910, the said case in the State Court was tried and resulted in a judgment for $4,000.00 in favor of the plaintiff and

against said railroad company. From such judgment said railroad company duly prosecuted an appeal to the State Supreme Court (R. 29, 74).

X. That on September 3rd, 1910, this petitioner filed a supplemental bill in this cause, setting out the verdict and judgment in the State Court and repeated in substance its prayer for relief as contained in the original bill, and again asked for a restraining order or temporary injunction (R. 26–30).

That on May 19th, 1910, said Taylor filed a demurrer to the original bill and on October 3rd, 1910, filed a demurrer to the supplemental bill.

XI. That on September 27th, 1910, this petitioner filed a petition thereon for a temporary injunction (R. 31). That on October 3rd, 1910, said Taylor filed an answer to said motion. This motion was argued and taken under advisement by the court. While so pending and on July 9th, 1912, the State Supreme Court of Mississippi affirmed the judgment in the Circuit Court of said state for $4,000.00. in favor of said Taylor and against the St. Louis and San Francisco Railroad Company.

XII. That on July 15th, 1912, this petitioner's motion for a temporary injunction restraining said Taylor from attempting to collect his said judgment was granted (R. 32, 33).

Thereafter, the supplemental bill having been amended (R. 46–49), the demurrers to the original and supplemental bills were argued. Thereafter on June 11th, 1913, said demurrers were overruled by the court (R. 44).

XIII. That on June 28th, 1913, said Taylor filed his answer to said original and supplemental bills. He denied that he had signed the Messengers' Agreement and alleged that the contracts between this Petitioner and said Taylor were and are in violation of the Federal Employers' Liability Act and are, therefore, null and void; that this petitioner was a common carrier by railroad, engaged in interstate commerce at the time he was hurt; that the railroad company was the agent or employe of the express company at that time, and he denied that the prosecution of the suit in the State Court was a violation of his contract (R. 49–53).

XIV. At the regular April term, 1914, of the court held at Aberdeen, Mississippi, this case was heard upon original and supplemental bills and exhibits, answer of defendant and oral testimony.

XV. That on September 22nd, 1914, the court delivered a written opinion, holding this petitioner was entitled to this relief prayed for in his said bills, and on October 2nd, 1914, a final decree was rendered in this case in favor of this petitioner.

From this decree an appeal was taken to the Circuit Court of Appeals for the Fifth Circuit. On such appeal the said Court of Appeals reversed the decree of the lower court and remanded the case, holding that this petitioner had failed to show that it was entitled to the relief prayed for, in that it had not stated that said Taylor was not a joint employe of the railroad and of the express company or was not in the employ of the railroad company at the time he was injured; or in other words, holding that the bills were insufficient. A petition for reargument was thereupon filed by this petitioner, in which petition, after asking for a rehearing, said appellant asked the court to certify the cause to this court, or that it modify its decree so that it would expressly authorize the District Court to allow appellant to amend its original bill in uniformity with such opinion. This petition was denied.

XVI. When the case was remanded to the District Court, said Taylor filed a motion for a decree, dismissing the bill. This motion was denied.

This petitioner then filed a motion to be allowed to amend the original and supplemental bill of the complaint. Such motion was sustained by the court and the bills were amended, by alleging that said Taylor was not in the employ of the railroad company at the time he was injured, that

the suit in the State Court of Mississippi prosecuted by said Taylor against the railroad company was not filed under the Federal Employer's Liability Act, and that there has never arisen any controversy as to whether or not Taylor was employed as a matter of fact by the railroad company, except the contention that the two contracts between the railroad and express companies, and between Taylor and the express company, constituted him such an employe.

XVII. An answer to this amended bill was filed by said Taylor and additional testimony was taken. The uncontradicted testimony showed that Taylor was not a joint employe of the express company and the railroad company. The final decree was then rendered by the District Court in favor of this petitioner, sustaining all the allegations of the bill (R. 78). This decree in part reads as follows:

> " . . . and it appearing to the Court
> " that all the allegations of the Original Bill,
> " and the amendments thereto, and the sup-
> " plemental bill, are true as therein stated,
> " and that the institution and prosecution of
> " the suit in the State Court of Mississippi
> " by the defendant, Oscar G. Taylor, against
> " the St. Louis and San Francisco Railroad
> " Company, was in direct violation of the
> " Messengers Agreement, a contract entered
> " into between the said Taylor and the Com-

" plainant, Wells Fargo & Company, and was " a fraud practised by the said Taylor upon " the complainant." . . .

XVIII. From this decree an appeal was taken to the Circuit Court of Appeals for the Fifth Circuit and on February 28th, 1918, said court handed down an opinion reversing the judgment of the lower court and remanding the cause, with directions to dismiss (R. 87).

XIX. That on March 19, 1918, a petition for a rehearing and a stay of the issuance of the mandate (R. 96) was filed by this Petitioner and thereafter and on April 15th, 1918, the petition for rehearing was denied (R. 103) and thereupon an order was entered that the mandate be stayed until May 20th, pending the filing with the United States Supreme Court by this petitioner of its petition for a writ of *certiorari*.

XX. The principal questions and propositions of law involved in the case are as follows:

(*a*) Does the Federal Employers' Liability Act, approved April 22nd, 1908 (358 Stat. at L., 65, Chapter 149), covering the liability of " every common carrier by railroad " apply to an express company, operating no railroad or trains but having its express matter and employes carried for it by the railroad for an agreed compensation?

(*b*) Do the agreement between a railroad company and Petitioner, as set forth in paragraph V

above and the agreement between petitioner and respondent, as set forth in paragraph VI above, constitute respondent an employee of said railroad company?

(*c*) Does Section 5 of the Federal Employers' Liability Act render the "Messenger's Agreement" herein void in all cases or merely void as a defense to an action based upon a "liability *created* by this Act"?

XXI. That concerning the effect of the Employers' Liability Act upon the contracts above recited, Judge Batts, in the opinion in the Circuit Court of Appeals below, said among other things:

> "The issue necessary to be determined is whether the Fifth Section of the Employers' Liability Act renders void so much of the contract between the messenger and the express company as undertakes to negative the right of the messenger to recover for injuries. *This answer is dependent upon whether the Act applies to express companies.* The language of the Act does not seem to leave any ground for construction or interpretation. It is perfectly clear and absolutely unequivocal that the terms of the Act apply to every common carrier by railroad . . ." (R. 92, 3).
>
> . . . . .
>
> "*Appellant is not seeking relief under the terms of the Employers' Liability Act,* but he is insisting that that part of the con-

tract which the Express Company claims deprived him of all protection, is void. We so hold."

"The judgment of the lower court is reversed and the cause remanded with directions to dismiss" (R. 94).

[Italics ours.]

XXII. That in Express Company *v.* United States, 212 U. S. 522, this court, in referring to the Act to Regulate Commerce, as originally passed in 1887, and by its terms applicable to "common carriers engaged in interstate commerce by railroad," said:

"As originally reported, this Act did not apply to express companies. The section was originally framed with the intention of making provisions for railroad carriers."

XXIII. That in Higgins *v.* Erie Railroad Company, 99 Atlantic 98, the Court of Errors and Appeals of New Jersey, in construing this same phrase of the Federal Employers' Liability Act, said:

"This action was instituted against the Erie Railroad Company and Wells Fargo & Company, to recover damages for the death of plaintiff's intestate. The liability of Wells Fargo & Company is rested on the Federal statute entitled 'an act relating to the liability of common carriers to their employes in certain cases, approved April 22nd, 1908, and that of the railroad company on the negligent operation of one of its engines." . . .

"The case of the defendant Wells Fargo & Company manifestly does not fall within the purview of the act of Congress relied upon by the plaintiff, *for it is not a common carrier 'by railroad'*, to which class of carriers alone the statute applies, and, therefore, as to this defendant the non-suit was correct."

[Italics ours.]

XXIV. And your Petitioner further avers that the present case is one in which it is proper for this court to issue a writ of *certiorari* for the following reasons, among others:

(*a*) Because this petitioner operating under this contract and under similar contracts with other railroad companies conducts an extensive express business in and through forty states of the United States and in its said business has not less than 16,000 employes and it together with other express companies operating under similar contracts with railroad companies conduct the express business of the United States and in said business have not less than 75,000 employes.

(*b*) Because the application and effect of the State Liability Statutes or State Compensation Statutes of at least thirty-five of the states in which these express companies conduct their express business depend directly upon whether the said Federal Employers' Liability Act does or does not embrace express companies within the designation "common carrier by railroad".

(*c*) Because there is a conflict between the Circuit Court of Appeals for the Fifth Circuit in its decision herein and the Court of Errors and Appeals of New Jersey, in the case of Higgins *v.* Erie Railroad Company above referred to.

(*d*) Because the Circuit Court of Appeals below has construed the Federal Employers' Liability Act incorrectly in holding

(1) that it applies to express companies;

(2) that it renders such assumption of risk void, in an action not based upon liability created by that act.

(*e*) Because the questions of law involved herein have not been passed upon by this Court.

(*f*) Because the public interest and the interests of jurisprudence require the decision of this Court upon the questions of law involved herein.

WHEREFORE, your petitioner prays that this Honorable Court will be pleased to grant a writ of *certiorari* in this case to the Circuit Court of Appeals for the Fifth Circuit to bring up this case to this Honorable Court for such proceedings therein as to this Honorable Court may seem just.

WELLS FARGO & COMPANY,
By BRANCH P. KERFOOT,
Attorney for Petitioner.

E. O. SYKES,
J. A. SYKES,
CHAS. W. STOCKTON,
Of Counsel for Petitioner.

STATE OF NEW YORK,
County of New York,
Southern District of New York. } ss.

CHARLES H. GARDINER, being duly sworn says, he is the Secretary of Wells Fargo & Company, the petitioner herein; that he has read the foregoing petition and knows its contents; that the same is true to the best of his knowledge and belief; that his knowledge and belief are based upon the record in the case, his general knowledge of the affairs of the company and statements made to him by counsel in the case.

CHARLES H. GARDINER.

Sworn to before me this
9th day of May, 1918.

J. A. MCLAUGHLIN,
Notary Public,
New York County.

(SEAL)

CERTIFICATE OF COUNSEL.

I hereby certify that I have examined the foregoing petition and in my opinion the petition is well founded, and that the case is one in which the prayer of the Petitioner should be granted by this court.

BRANCH P. KERFOOT,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES.

In the Matter of the Petition of
WELLS FARGO & COMPANY,
Petitioner,

AGAINST

OSCAR G. TAYLOR,
Respondent.

For a Writ of Certiorari, directed to the Circuit Court of Appeals, for the Fifth Circuit, to bring before the Supreme Court the case of OSCAR G. TAYLOR, Appellant, ads. WELLS FARGO & COMPANY, Appellee.

SIRS:

Please take notice that upon a certified copy of the transcript of the record herein and upon the annexed petition of Wells Fargo & Company, verified the 9th day of May, 1918, I shall submit the motion hereto annexed before the Supreme Court of the United States at the Capitol in the City of Washington, District of Columbia, on Monday, the 27th day of May, 1918, at the open-

ing of Court on that day or as soon thereafter as counsel can be heard, and that I shall then and there move for such further relief in the premises as may be just.

Dated, New York, May 9, 1918.

BRANCH P. KERFOOT,
Petitioner
Attorney for Appellee.

To MESSRS. PAINE & PAINE,
Attorneys for Respondent.

UNITED STATES SUPREME COURT.

In the Matter of the Petition of
WELLS FARGO & COMPANY,
Petitioner,

AGAINST

OSCAR G. TAYLOR,
Respondent.

For a Writ of Certiorari directed to the Circuit Court of Appeals, for the Fifth Circuit, to bring before the Supreme Court the case of OSCAR G. TAYLOR, Appellant, ads. WELLS FARGO & COMPANY, Appellee.

Now comes the petitioner above named, by Branch P. Kerfoot, its attorney, and moves this Court, upon a certified copy of the transcript of the record herein and upon the annexed petition, verified the 9th day of May, 1918, for a Writ of *Certiorari*, directed to the Circuit Court of Appeals for the Fifth Circuit and to the District Court for the Northern District of Mississippi, to bring before this Court the case of Oscar G. Taylor, Appellant, ads. Wells Fargo & Company, Appellee, recently decided by the Circuit Court

of Appeals, Fifth Circuit, and by the District Court for the Northern District of Mississippi, for such proceedings herein as to the Court may seem just; and for such other and further relief in the premises as may be just.

BRANCH P. KERFOOT,
Attorney for Petitioner.

E. O. SYKES,
J. A. SYKES,
CHAS. W. STOCKTON,
Of Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES.

WELLS FARGO & COMPANY,
Petitioner,
(Appellee below),

AGAINST

OSCAR G. TAYLOR,
Respondent,
(Appellant below).

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

The principal question in this case is whether the Federal Employers' Liability Act (approved April 22nd, 1908) does or does not apply to an express company, like this petitioner, which does not operate or direct any railroad or railroad trains, but which by virtue of a contract with a railroad company has its express matter transported for it over the lines and upon the trains of that railroad for an agreed compensation.

Pursuant to a contract with the St. Louis and San Francisco Railroad Company, in which as part consideration for the carriage of its express matter, the express company agreed to protect it from any claims for injuries to employes of the express company (R. 9, 14), this petitioner, on December 8th, 1909, sent certain interstate express shipments, in the custody of the respondent as its express messenger, between points on the line of said railroad. The train was wrecked and the messenger sustained personal injuries (R. 11). He sued the railroad company in the State Court (R. 73). The express company, after having tried unsuccessfully to have itself made a party to that action, began an equity suit in the Federal District Court for the Northern District of Mississippi, seeking to restrain temporarily and upon the final hearing therein to enjoin perpetually said Taylor from proceeding with said law suit against the St. Louis and San Francisco Railroad Company and for a decree that he specifically perform and carry out his agreement by which he had assumed all risk of his said employment and had agreed to hold harmless both the express company and the railroad company (R. 12, 9–25).

Both the contract between the railroad company and the express company and the "Messenger's Agreement" executed by said Taylor were set out at length as parts of the Bill in this

suit and are printed at pages 14 and 23, respectively, of the Record herewith submitted.

The motion for a restraining order was denied. Said Taylor, on July 12th, 1910, obtained judgment for $4,000.00 against the railroad company, and this fact was alleged herein by a Supplemental Bill (R. 29, 74).

Later, the State Supreme Court meantime having sustained said Taylor's judgment against the railroad company, a new motion for temporary injunction herein was granted (R. 32, 33).

The cause was heard at the April term, 1914, of the United States District Court, and on October 2nd, 1914, a final decree was rendered in favor of this petitioner and against said Taylor.

Taylor appealed to the Circuit Court of Appeals and the decree was reversed and the cause remanded, the court holding that the bill was insufficient, in that it failed to allege that said Taylor was not a joint employe of the railroad company and this petitioner, and was not in the employ of the railroad company at the time of his injury.

In the lower court the bill was amended accordingly and additional testimony was introduced by each party. Decision was rendered in favor of the appellee, sustaining all the allegations of the bill (R. p. 78). This decree in part reads as follows:

> . . . "and it appearing to the Court that all the allegations of the Original Bill,

> and the amendment thereto, and the supplemental bill, are true as therein stated, and that the institution and prosecution of the suit in the State Courts of Mississippi by the defendant, Oscar G. Taylor, against the St. Louis and San Francisco Railroad Company was in direct violation of the Messenger's agreement, a contract entered into between the said Taylor and the complainant Wells Fargo & Company, and was a fraud practised by the said Taylor upon the complainant"; . . .

From this decree also an appeal was taken by said Taylor and the Circuit Court of Appeals has now reversed that decree and holds that the "Messenger's Agreement" is made void by section five of the Federal Employers' Liability Act, approved April 22nd, 1908 (R. 87).

The ground of jurisdiction of the Federal Court in this suit was the diversity of citizenship between Wells Fargo & Company, a Colorado corporation, and said Taylor, a citizen of Mississippi (R. 9). The decree of the Circuit Court of Appeals is final and the matter can be brought to this court by writ of *certiorari*.

It is important that this question be determined by the United States Supreme Court, because the operations of this petitioner and similar express companies extend throughout the United States

and most of the states (to wit, at least 35) have local statutes fixing liability of express companies to their employes or providing for compensation by such employers to their employes for injuries received in the performance of their duties. As to all of these statutes, either by specific provisions to that effect or by operation of law, the extent to which they apply or are enforcible is dependent upon whether the federal act is or is not directed to the express companies. Accidents resulting in personal injuries to some of the thousands of express employes in this country are constantly occurring and resulting in proceedings before state compensation boards or suits in state or federal courts. Some of these state bodies have held that their acts apply because the federal act does not; others have held that the local acts do not apply because the federal act does and even the courts do not agree on this point.

POINTS AND AUTHORITIES.

I. THE QUESTION PRESENTED BY THIS PETITION IS ONE OF NATION-WIDE INTEREST.

II. THE PROPER INTERPRETATION AND THE ENFORCEMENT OF THE LIABILITY OR COMPENSATION STATUTES IN AT LEAST THIRTY-FIVE STATES ARE DEPENDENT UPON A PROPER AND FINAL ADJUDICATION OF THE QUESTION HERE PRESENTED.

III. THERE WILL BE A HOPELESS CONFLICT OF DECISIONS UNTIL THIS COURT DECIDES THE QUESTION HERE PRESENTED TO IT.

Higgins *v.* Erie Railroad Co., 99 Atlantic, 98.

IV. THE FEDERAL EMPLOYERS' LIABILITY ACT DOES NOT APPLY TO EXPRESS COMPANIES.

In re Express Co., 1 I. C. C. 677.
United States *v.* Morsman, 42 Fed. 448.
Southern Ind. Exp. Co. *v.* U. S. Exp. Co., 88 *id.* 658.
Same case (in C. C. A.), 92 *id.* 1022.
Amer. Exp. Co. *v.* U. S., 212 U. S. 522.
Higgins *v.* Erie, *supra.*

V. THE EMPLOYERS' LIABILITY ACT, EVEN IF APPLICABLE TO EXPRESS COMPANIES, WOULD NOT RENDER VOID A RELEASE FROM LIABILITY NOT CREATED BY THAT ACT.

VI. THIS IS A PROPER CASE FOR THE EXERCISE OF THE COURT'S POWER TO ISSUE A WRIT OF CERTIORARI.

American Sugar Ref. Co. *v.* New Orleans, 181 U. S. 277, 279.
Lau Ow Bew, Petitioner, 141 U. S. 583.
Forsyth *v.* Hammond, 166 U. S. 506.
Montana Mining Co. *v.* St. Louis Mining Co., 204 U. S. 204.
Fields *v.* U. S., 205 U. S. 292.
St. L., K. C. & C. R. R. Co. *v.* Wabash, 217 U. S. 247.

ARGUMENT.

I.

THE QUESTION PRESENTED BY THIS PETITION IS ONE OF NATION-WIDE INTEREST.

Wells Fargo & Company conducts an express business in, between and through forty of the states of the United States and all of its express matter is moved for it by railroads under contracts similar to the one here in question. It does not operate, direct or control any railroads or trains. In the course of its said business and scattered through forty states it has over 16,000 employes. The other express companies have their express matter transported for them under

similar contracts and in the course of their business have many thousands of employes. The number of employes of the four larger express companies alone is about 75,000, to whom and to the shareholders of the said express companies, a correct and controlling decision of the question hereby presented is important.

II.

THE PROPER INTERPRETATION AND THE ENFORCEMENT OF THE LIABILITY OR COMPENSATION STATUTES IN AT LEAST THIRTY-FIVE STATES ARE DEPENDENT UPON A PROPER AND FINAL ADJUDICATION OF THE QUESTION HERE PRESENTED.

At least thirty-five of the states have their own statutes, prescribing and defining liability of employers to their employes within the state, in very much the same way that the Federal Statute here in question prescribes and defines the liability of the employers covered by it to their employes therein mentioned, or else have statutes providing for compensation to be paid by employers to employes injured in their service. A large number of these state statutes provide specifically that they shall not apply to employes engaged in interstate commerce, for whom a rule of liability is fixed by Congress. To those not

having this specific exception, the same exception applies as a matter of law.

In determining therefore whether a statute of any state applies to an employe of an express company, engaged in interstate commerce, it is first necessary to determine whether Congress has fixed for him a rule of liability by this act, *i. e.*, whether the Federal Act applies to express companies.

The State Boards charged with the administration of these statutes are not in accord on this point; some have held that the Federal Act does not apply to express companies and, therefore, the State Statute does; others have held that the Federal Act does apply to express companies, and, therefore, that the local statute does not.

III.

THERE WILL BE A HOPELESS CONFLICT OF DECISIONS UNTIL THIS COURT DECIDES THE QUESTION HERE PRESENTED TO IT.

In addition to the difference of opinion between the Boards charged with the administration of the State liability and compensation statutes, as above mentioned, a conflict between the courts has already begun and must continue and increase until a final and controlling decision is rendered. Such a decision can be rendered

by no court other than the United States Supreme Court.

The Court of Errors and Appeals of New Jersey, in Higgins *v.* Erie Railroad Company, 99 Atlantic, 98, was compelled to decide whether the Federal Employers' Liability Act did or did not apply to express companies. It had no difficulty in arriving at a decision that the express companies were not included within the act. Among other things that court said:

> . . . " This action was instituted against the Erie Railroad Company and Wells Fargo & Company, to recover damages for the death of plaintiff's intestate. The liability of Wells Fargo & Company is rested on the federal statute entitled ' an act relating to the liability of common carriers to their employes in certain cases ', approved April 22nd, 1908, and that of the railroad company on the negligent operation of one of its engines." . . .
>
> . . . " The case of the defendant Wells Fargo & Company manifestly does not fall within the purview of the act of Congress relied upon by the plaintiff, for it is not a common carrier ' by railroad ' to which class of carriers alone the statute applies, and therefore, as to this defendant, the nonsuit was correct." . . .

In direct conflict with this is the decision of the Circuit Court of Appeals for the Fifth Cir-

cuit in the case presented to this court by the petition herewith.

The fact that liability or compensation statutes are now in effect in so many of the states and the fact that most of such statutes have been enacted within the last few years, render it entirely probable that no small amount of litigation will result and that the courts in different jurisdictions, being called upon to pass upon this question, will not be in accord. As the amounts involved in these cases are frequently large, appeals may be expected in many of them, with the result that the courts of last resort in the states and the Circuit Courts of Appeals in the different circuits will not, for many years, if ever, find themselves in accord, unless guided to that end by a decision of this court.

In addition to the conflict above indicated, the Appellate Court below in this case seems to be in conflict with the Interstate Commerce Commission and with this Court itself, unless some distinction, not apparent to us, exists between the meaning of the words "common carrier by railroad", as used in this act, and the words "common carrier . . . wholly by railroad", etc., as contained in the original Act to Regulate Commerce. These decisions are more fully referred to under the following point:

IV.

THE FEDERAL EMPLOYERS' LIABILITY ACT DOES NOT APPLY TO EXPRESS COMPANIES.

This court and the Interstate Commerce Commission have already construed substantially the same words now under examination.

The original Act to Regulate Commerce (24 Stat. at L. 379, approved February 4th, 1887) was limited by its terms as is the Employers' Liability Act of 1908.

Act to Regulate Commerce.	Employers' Liability Act.
"*Any common carrier* or carriers engaged in the transportation of passengers or property wholly *by railroad* or partly by railroad and partly by water, when both . . ."	"*every common carrier by railroad.*"

The Interstate Commerce Commission held (*In re* Express Companies, 1 I. C. C. 677) that express companies were not within this act.

This decision was followed in

United States *v.* Morsman, 42 Fed. 448.

Southern Ind. Exp. Co. *v.* U. S. Exp. Co., 88 *id.* 658.

Same case (in C. C. A.) 92 *id.* 1022.

And the Supreme Court held to the same effect in Amer. Exp. Co. *v.* U. S., 212 U. S. 522, where it said at page 534:

> "As originally reported the Act did not apply to Express Companies. The Section was originally framed with the intention of making a provision for railroad carriers."

In 1906 the Act to Regulate Commerce was amended so as to apply to express companies.

Certainly after all of this, the following language used by the Interstate Commerce Commission in its decision above referred to is peculiarly applicable now:

> "It is moreover true, as claimed, that the express business, so-called, has been of such long standing and presents such a well known and complete organization in every portion of the country that it must be considered to be a subject which was perfectly understood by Congress at the time of the enactment of the law in question. More than this, it is a business which has heretofore and frequently been the occasion of distinct legislation by Congresss, both in connection with railroad business and as contradistinguished therefrom" . . .

State legislatures have passed statutes and state boards and courts have rendered decisions based upon an application, to the language used by Congress in 1908, of the construction that this

and other courts have placed since 1887 upon the same words, as then used by Congress. If the decision herein of the Circuit Court of Appeals for the Fifth Circuit be allowed to stand, serious and wide confusion will result.

V.

THE EMPLOYERS' LIABILITY ACT, EVEN IF APPLICABLE TO EXPRESS COMPANIES, WOULD NOT RENDER VOID A RELEASE FROM LIABILITY NOT CREATED BY THAT ACT.

Taylor was not an employe of the railroad company (R. 47, 51 and 78) and his suit was not based upon any liability created (or even alleged to have been created) by that Act. Likewise, the suit brought by Petitioner against Taylor did not involve any liability created by that Act. On this point the Circuit Court of Appeals below said at the end of its opinion (R. 94):

> "Appellant is not seeking relief under the terms of the Employers' Liability Act, but he is insisting that that part of the contract which the Express Company claims deprived him of all protection, is void. We so hold."

But all that that Act provides in this regard is

> "Sec. 5. [*Agreements, etc., for exemption from liability—set-off of insurance, etc., con-*

tributions.] That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void . . . ."

VI.

THIS IS A PROPER CASE FOR THE EXERCISE OF THE COURT'S POWER TO ISSUE A WRIT OF CERTIORARI.

The jurisdiction of the District Court is based on diversity of citizenship and not on any other ground, and the decision of the case by the Circuit Court of Appeals, although resting upon the construction of the Federal Employers' Liability Statute, is final and this court can correct the erroneous interpretation of this federal statute upon *certiorari*, and in no other way.

American Sugar Ref. *v.* New Orleans, 181 U. S. 277, 279.

The Interpretation of this federal statute is of great and widespread importance.

The fact that the Circuit Court of Appeals has taken this view of it (different as it is from that of (*a*) the District Court, the court of last resort in the State of New Jersey, (*b*) the Interstate Commerce Commission, and (*c*) this court itself,

in construing the same wording when used in the original Act to Regulate Commerce), indicates that the question must be open to controversy and shows that an actual conflict exists, at least between this Circuit Court of Appeals and the court of last resort in New Jersey.

See *ex parte* Lau Ow Bew, Petitioner, 141 U. S. 583, where this court said:

> "It is evident that it is solely questions of gravity and importance that the Circuit Court of Appeals should certify to us for instruction; and it is only when such questions are involved that the power of this court to require a case in which the judgment and decree of the Court of Appeals is made final, to be certified, can be properly invoked. The inquiry upon this application, therefore, is whether the matter is of sufficient importance in itself and sufficiently open to controversy to make it the duty of the Court to issue the writ applied for in order that the case may be reviewed and determined as if brought here on appeal or writ of error." And

Forsyth *v.* Hammond, 166 U. S. 506, where this court said:

> "While this power is coextensive with all possible necessities and sufficient to secure to this court a final control over the litigation in all the courts of appeal, it is a power which will be sparingly exercised and only when the circumstances of the case satisfy us that the importance of the question involved, the

necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of the State or some matter affecting the interests of this nation in its internal or external relations, demand such exercise."

See also:

Montana Mining Co. *v.* St. Louis Mining Co., 204 U. S. 204.
Fields *v.* U. S. 205, U. S. 292.
St. L., K. C. & C. R. R. Co. *v.* Wabash, 217 U. S. 247.

WHEREFORE, it is respectfully submitted that the writ of *certiorari* should issue as prayed.

May, 1918.

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